SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 407

WALTER HUMPHREY, ETC., ET AL.,
PETITIONERS,

vs.

C. W. MOORE, ETC., ET AL.

No. 408

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 89, PETITIONER,

vs.

C. W. MOORE, ET AL.

ON WRITS OF CERTIORARI TO THE COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY

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[fol. 5]

IN JEFFERSON CIRCUIT COURT

CHANCERY BRANCH, FIRST DIVISION

C. W. Moore, Individually and for and on Behalf of Members of the Class, Plaintiffs,

vs.

Local Union No. 89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and Dealers Transport Company, Defendants.

Complaint—Filed November 8, 1961

Count I

Comes the plaintiff, C. W. Moore, individually and for and on behalf of members of the class, and for his cause of action designated as Count I herein, states:

(1) Plaintiff, C. W. Moore, is a resident of Louisville, Kentucky, and an employee of Dealers Transport Company; that this action is brought under Rule 23.01 as a class action for and on behalf of all the employees of Dealers Transport Company as of March 1, 1961; that there are approximately 300 of said employees and that it is impracticable to name all as parties plaintiff, and that this plaintiff has a common question of law and fact with all [fol. 6] of the employees of said Transport Company as of March 1, 1961, and that a common relief is sought by this action.

(2) The defendant, Local Union 89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (hereafter referred to as Local No. 89) is an unincorporated association, engaged in the organizing and unionizing of persons employed in various trucking

concerns and specifically the employees of Dealers Transport Company and E & L Transport Company, both of Louisville, Jefferson County, Kentucky.

(3) The defendant, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereafter referred to as International Brotherhood) is an unincorporated association engaged in the organizing and unionizing of persons employed in various trucking concerns and elsewhere, and is the parent and national organization, of which the co-defendant, Local No. 89, is a part.

(4) Dealers Transport Company is a corporation with offices at Fern Valley Road, Louisville, Jefferson County, Kentucky, and is incorporated in the State of Tennessee and operates a trucking business throughout the southern portion of the United States.

(5) Plaintiff, for his cause of action herein, states that on March 1, 1961, the employees of Dealers Transport Company, through their bargaining agent, the International Union, above referred to, entered into a contract for the employees of Dealers Transport Company for a period of four years, beginning March 1, 1961 and ending February 29, 1964; that after the making of said contract, the E & L [fol. 7] Transport Company, a rival trucking concern, discontinued business in Louisville, Kentucky and made a trade with Dealers Transport Company whereby Dealers Transport Company took over the secondary runs theretofore made by E & L Transport Company and in return therefor were assigned certain secondary runs belonging to Dealers Transport Company in the state of Ohio, and other considerations unknown to plaintiff; that after Dealers Transport Company took over the secondary runs of E & L Transport Company, two former employees of E & L Transport Company, to-wit, R. L. Lewis and Howard Baker, filed a grievance under the provisions of the Automobile Carrier Truckaway Agreement, copy of which is filed herewith as Exhibit A and made a part hereof, the same as if copied at length herein, asking that all employees of E & L be sandwiched in with the employees of Dealers Transport Company and given seniority on the basis of the seniority

which theretofore they had acquired with E & L Transport Company; that this plaintiff and the local employees of Dealers Transport Company relied on Local Union No. 89, acting by and through its president, Paul Priddy, and the integrity and fairness of Local No. 89 and the International Brotherhood, its officers and agents, to take care of their interest in said grievance, and that the employees of Dealers Transport Company were assured by Paul Priddy, president of Local No. 89, that they had nothing to worry about and that precedent in the industry provided that when a new business is taken over that its employees do not displace the original employees of the company. The griev- [fol. 8] ance went to arbitration before the local grievance committee and there it was deadlocked by Paul Priddy with the statement that this was a matter to be handled by the Automobile Transporters Joint Conference Committee and that the hearing before this committee would be in Detroit, Michigan; that said hearing was held on the 18th day of October, 1961, at Detroit, Michigan, and that there the representatives of Dealers' employees were first informed by the said Paul Priddy that he had gone over to the other side and that he was urging that the E & L Transport Workers be employed by Dealers on the basis of their previous seniority with E & L Transport Company; that said Paul Priddy, at the time, was a member of the Automobile Transporters Joint Conference Committee; that he argued the case for the E & L workers before the Committee and then withdrew as a member; that his actions in deceiving these plaintiffs as to his position left them without representation before the Joint Conference Committee and the defendant, International Brotherhood, conspired with and assisted the defendant, Local No. 89, and its president, Paul Priddy, in bringing about this result, by reason of which the Joint Conference Committee, acting on the request of Paul Priddy, president of Local No. 89, handed down a decision as follows:

"Local Union No. 89 (Louisville vs. Dealers Transport Co. and E & L Transport Co. of Ky. Re: Request of Employees R. L. Lewis and Howard Baker on behalf of themselves and other former employees of E & L

Transport Co. of Ky. as to their seniority rights with Dealers Transport Co. because of the discontinuance of operations in Louisville by E & L Transport Co. of Ky.

[fol. 9]

DECISION: By unanimous vote the Committee held that in accordance with Article 4 and particularly subsections 4 and 5 of the Automobile Carrier Truckaway Agreement, Automobile Carrier Driveaway Agreement and the Automobile Carrier City Delivery, Pull-Out, Mounting Service and Yard Agreement and Garage Rider, the employees of E and L Transport Co. of Ky. and Dealers Transport Company at the Louisville, Kentucky Terminal shall be sandwiched in on master seniority boards using the presently constituted seniority lists and the dates contained therein at Louisville, Kentucky (past practice on layoffs and recalls shall be maintained as in the past).

1. Presently constituted terminal seniority lists shall apply for seniority purposes recognizing that the first fifty (50) men who came from Memphis, Tennessee to Louisville, Kentucky maintained their original date of hire and took their proper place on the Louisville seniority boards of Dealers Transport Company. Men subsequently who came to Louisville from Memphis went to the bottom of the board at Dealers Transport Company and maintained their seniority for fringe benefits only.

2. This shall be accomplished within thirty (30) days. Copies of this decision shall be posted on the bulletin boards at both companies."

Plaintiff further states that the decision above referred to was contrived, planned and brought about by Paul Priddy as president of Local Union No. 89; that the power and influence of the International Union was used against

the local employees of Dealers Transport Company, and that the effect of the above ruling deprives at least 250 of the 300 original employees of Dealers Transport Company of their jobs and replaces them with the former employees of E & L Transport Company; that said decision is arbitrary and capricious and contrary to any previous existing practice in the industry, and that it is a violation of sub-[fol. 10] section 2 of Section B of Section 6 of Article IV, which sets out the procedure to be followed when a branch terminal division is partially closed, said section providing that the employees from such closed division are to go to the bottom of the seniority board and a violation of other sections of said agreement (Exhibit A), and Supplement attached hereto.

Plaintiff further states that the employees of Dealers Transport Company had joined the International Union for the purpose of having said Union act as the bargaining agent for these employees; that said International Union, by and through the president of Local Union No. 89, Paul Priddy, has deceived and failed completely to represent said employees, and has acted against the interest of said employees in causing to be brought about the decision above set out; that this plaintiff and the employees of Dealers Transport Company have exhausted all appeals under the Automobile Carrier Truckaway Agreement, and have no other avenue of appeal except to a court of law.

(6) Plaintiff further states that this plaintiff and the employees of Dealers Transport Company have no adequate remedy at law; that the 250 employees about to be displaced will lose their employment and livelihood and that many are in the process of buying homes and they will lose their homes, and that no remedy at law through an action for damages can replace the security of the jobs which they now have and which they would still retain, had not the International Union, through Local No. 89, failed completely to represent the interest of these employees; that irreparable harm, damage and injury will be done to the [fol. 11] plaintiff and the employees of Dealers Transport Company unless the Teamsters Union and Dealers Transport Company are enjoined from putting into effect the

ruling above set out; that a temporary injunction should be issued against the company and Local Union No. 89, and the International Brotherhood, restraining them from proceeding under the above mentioned decision until this action has been heard by the court, and that no restraining order or injunction has heretofore been refused by this or any other court.

Count II

Plaintiff, C. W. Moore, individually and for and on behalf of members of the class, for an alternative cause of action under Rule 18.01 of the Kentucky Rules of Civil Procedure, and without waiving any of the allegations contained in Count I of this complaint, states:

(1) Adopts, reiterates and makes a part of Count II of this complaint the allegations contained in numerical paragraphs 1, 2, 3, 4, and 5 of Count I herein.

(2) That in the event the court denies injunctive relief, that the employees of Dealers Transport Company are about to suffer damage through the loss of their jobs; that all of the employees of Dealers Transport Company have paid an initiation fee of $50.00 per man to join the Teamsters Union; that they pay $5.00 per month dues; that the contract under which the Dealers employees work was negotiated for the use and benefit of the employees of [fol. 12] Dealers Transport Company and not as an instrument to be used by the International Union to displace the local employees and put the workers of E & L Transport Company in their jobs; that because of the false and deceitful action of Paul Priddy, acting for and on behalf of Local No. 89 as its president, in deadlocking the local grievance committee, and taking the matter to the Automobile Transporters Joint Conference Committee, and the further connivance of Paul Priddy with the employees of E & L Transport Company, in assuring the local employees of Dealers that they had nothing to worry about, that precedent in the industry would take care of their position and that employees of a branch terminal or division that is closed automatically start at the bottom of the

seniority list, that because of these representations and because of the action in securing the decision set out in Count I, that when and if said decision goes into effect, 250 of the employees of Dealers Transport Company will be displaced and will lose their jobs; that the action of the International Union is arbitrary, and capricious and in violation of sub-section 2, Page 17, and other provisions, of the Automobile Carrier Truckaway Agreement under which the employees of Dealers Transport Company work, and that the average pay of the employees of Dealers Transport Company is $8,000.00 per year; and that the loss to the 250 employees of Dealers Transport Company for the balance of the duration of the contract in question will amount to $6,625,000.00.

[fol. 13] (3) Plaintiff further states that the employees of Dealers Transport Company now have and always have had a friendly relationship with their employer; that they have no dispute with their employer; that except for the interference of Local No. 89 and the International Union, acting through Paul Priddy, the Original employees of Dealers and the company would have agreed on the grievance filed by the two former employees of E & L Transport Company; but that because of the interference of the International Union with the employment of these plaintiffs, they are about to be damaged and will be damaged in the sum of $6,625,000.00.

Wherefore, Plaintiff, C. W. Moore, individually and for and on behalf of members of the class, under Count I herein, prays the court for a temporary injunction against the Company, Local No. 89 and the International Brotherhood, to prevent the carrying into effect the decision set out in paragraph 5 of Count I, and further prays that the temporary injunction be made final and permanent upon final adjudication of this cause; and in the alternative, under Count II herein, the plaintiff prays for a judgment for damages for he and members of the class in the sum of $6,625,000.00 and for a trial by jury upon all issues raised in Count II, and the plaintiff prays for his costs herein

expended and any and all relief to which he and the members of the class are entitled.

Brown & Father, John Y. Brown, Kentucky Home Life Bldg., Louisville, Kentucky, Telephone JU 4-1244.

[fol. 14] *Duly sworn to by C. W. Moore, jurat omitted in printing.*

[fol. 19]

EXHIBIT "A" TO COMPLAINT

AUTOMOBILE CARRIER
TRUCKAWAY
AGREEMENT

Period Covered—March 1, 1961
through February 29, 1964

[Emblem]

NATIONAL TRUCKAWAY AND
DRIVEAWAY CONFERENCE
of the
International Brotherhood
of
Teamsters, Chauffeurs, Warehousemen
and Helpers of America

[fol. 19a]

ARTICLES OF AGREEMENT

AUTOMOBILE CARRIER TRUCKAWAY AGREEMENT

The ..... hereinafter referred
(Company)
to as the Employer,

and

the National Truckaway and Driveaway Conference and Local Union No. ....., affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereinafter referred to as the Union, agree to be bound by the terms and provisions of this Agreement.

ARTICLE 1

Section 1. UNION SHOP AND DUES

(a) The Employer recognizes and acknowledges that the National Truckaway and Driveaway Conference, on behalf of its member local unions, is the exclusive representative of all employees in the classifications of work covered by this Agreement for the purposes of collective bargaining as provided by the National Labor Relations Act.

* * * * * * *

[fol. 19b]

ARTICLE 4

Section 1. SENIORITY

Seniority rights for employees shall prevail. Seniority shall be broken only by discharge, voluntary quit, or more than a two (2) year layoff. A list of the employees arranged in the order of their seniority shall be posted in a conspicuous place and shall be available to all employees. Any controversy over the employees' standing on such lists shall be submitted to the joint grievance procedure (ARTICLE 7). Such determination shall be made without regard to

whether the employees involved are members or not members of a Union. * * *

* * * * * * * *

[fol. 19c]

Section 5.

In the event that the Employer absorbs the business of another private, contract or common carrier, or is a party to a merger of lines, the seniority of the employees absorbed or affected thereby shall be determined by mutual agreement between the Employer and the Unions involved. Any controversy with respect to such matter shall be submitted to the joint grievance procedure (ARTICLE 7).

* * * * * * * *

[fol. 19d]

ARTICLE 6

Section 1. LOCAL JOINT COMMITTEE

The Employers and the Union in each city and/or area where there are three or more Truckaway and/or Driveaway companies, shall together create a permanent Local Joint Committee, which shall consist of an equal number, appointed by Employers and Union, but not less than three (3) from each group. Each member may appoint an alternate in his place.

The Local Joint Committee shall at its first meeting formulate rules of procedure to govern the conduct of its proceedings. Each Local Joint Committee shall have jurisdiction over disputes and grievances involving said Local Union.

Section 2. AUTOMOBILE TRANSPORTERS JOINT CONFERENCE COMMITTEE

The Employers and the Unions shall together create a permanent Automobile Transporters Joint Conference Committee which shall consist of duly elected delegates of [fol. 19e] the Employers (Automobile Transporters Labor Division) and of the Unions (National Truckaway and Driveaway Conference).

Section 3. Function of Committees

It shall be the function of the various committees above referred to, to settle disputes which cannot be settled by the Employer and the Local Union in accordance with the procedure established herein.

Section 4. Attendance

Meetings of all Committees above referred to must be attended by each member of such Committee or his alternate.

Section 5. Examination of Records

The Local Joint Committee or the Automobile Transporters Joint Conference Committee shall have the right to examine time sheets and any other records pertaining to the computation of compensation of any individual or individuals whose pay is in dispute.

ARTICLE 7

Section 1. No Strike and/or Lock-Out

The Unions and the Employers agree that there shall be no strike, tie-up of equipment, slow-downs or walk-outs on the part of the employees, nor shall the Employer use any method of lock-out or legal proceeding without first using all possible means of a settlement, as provided for in this Agreement, of any controversy which might arise.

[fol. 19f] Section 2. Grievance Procedure

(a) Disputes shall first be taken up between the Employer and the Local Union involved. If the parties are unable to settle the dispute, the same shall then go to the Local Joint Committee. In any city where there is no Local Joint Committee, the same may be appealed directly to the Automobile Transporters Joint Conference Committee. Where a Local Joint Committee, by a majority vote, settles a dispute, no appeal may be taken to the Automobile Transporters Joint Conference Committee. Such a decision shall be final and binding on both parties and will apply only in

the jurisdiction of the involved Local Union. However, the Automobile Transporters Joint Conference Committee reserves the right to review all such decisions and facts pertaining thereto, and should it find any such decision has been rendered in error according to this Agreement and/or applicable Rider and the facts surrounding the particular case, the Automobile Transporters Joint Conference Committee may revoke the original decision, render a new decision, and order same to be put into effect.

(b) Where a Local Joint Committee is unable to agree or come to a decision on a case, it shall, at the request of the Union or the Employer involved, be appealed to the [fol. 19g] Automobile Transporters Joint Conference Committee at the next regularly constituted session. Committee's failure to meet, not due to complaining side's fault, withdraws benefits of this Article.

(c) If any grievance or disagreement is not satisfactorily settled, as provided above, then both the Union and the Employer shall submit the grievance to a Board of Arbitration consisting of three (3) members:

One (1) member to be appointed by the Union; one (1) member by the Employer; and the two (2) together appointing a third disinterested arbitrator.

All grievances submitted to the Board of Arbitration must be heard and disposed of within two (2) weeks. The findings of the Arbitration Board shall be final.

(d) It is agreed that all matters pertaining to the interpretation of any provision of this Agreement, whether requested by the Employer or the Union, must be submitted to the full Committee of the Automobile Transporters Joint Conference Committee, which Committee, after listening to testimony on both sides, shall make a decision.

[fol. 19h] (e) Any decision of the Automobile Transporters Joint Conference Committee shall be final and conclusive and binding upon the Employer and the Union, and the employees involved.

(f) In the event of strikes, work-stoppages or other activities which are permitted in case of deadlock, default, or failure to comply with majority decision, no interpretation of this Agreement by any tribunal shall be binding upon the Union or affect the legality or lawfulness of the strike unless the Union stipulates to be bound by such interpretation, it being the intention of the parties to resolve all questions of interpretation by mutual agreement. Nothing herein shall prevent legal proceedings by the Employer where the strike is in violation of this Agreement.

Section 3. ROAD CHECK CARS

All Road Check Cars must have proper identification and written copy of violations, if any, given to driver at time of check. All photo observation films taken by cameras approved by the Joint Committee shall be accepted as evidence, but drivers must be given a written copy of such violation at the scene or within a reasonable time after photo was taken.

[fol. 19i] It is further agreed that all notices of violations and disciplinary action, if any, under this section shall be given to the driver within ten (10) days, except where a driver is not available and in such cases not to exceed sixteen (16) days.

• • • • • • • •

[fol. 19j]

ARTICLE 38

MULTI-EMPLOYER UNIT

The undersigned Employer agrees to be bound by all of the terms and provisions of this Agreement, and also agrees to be bound by the interpretations and enforcement of the Agreement.

The Employer further agrees to participate in joint negotiations of any modification or renewal of the Agreement and to become a part of the multi-employer unit set forth in the Agreement.

• • • • • • • •

[fol. 19k] IN WITNESS WHEREOF, the parties hereto have set their hands and seals this ..... day of ..... 1961, effective March 1, 1961, except as specifically provided for herein.

NEGOTIATING COMMITTEE

For the Employees:

NATIONAL TRUCKAWAY AND DRIVEAWAY CONFERENCE
James R. Hoffa, Chairman
William R. Walsh, Secretary
Frank Fitzsimmons
Joseph de Lavan
James M. Feltis
E. J. Robillard
Dale Ferris
Clay Ward

For the Employers:

AUTOMOBILE TRANSPORTERS LABOR DIVISION
Carney D. Matheson, Chairman
Albert D. Matheson, Secretary
Robert A. Parr, Ass't Secretary
Donald Hayden
Walter F. Carey
E. A. Cassaroll
J. H. Stark, Jr.
E. G. Rice
Horace Taylor
D. W. Rentzel
George Demos

[fol. 191] LOCAL UNION No. ..... affiliate of I. B. of T., C. W. & H. of A.

By .....
(Signed)

.....
(Title)

.....
(Company)

By .....
(Signed)

.....
(Title)

ADDRESS: .....
(Street)

.....
(City) (State)

[fol. 43]

IN JEFFERSON CIRCUIT COURT
CHANCERY BRANCH, FIRST DIVISION
No. 61535

[Title omitted]

AMENDED COMPLAINT

Comes the plaintiff, and for his Amended Complaint filed herein, reiterates each and every allegation of the original Complaint filed herein and in addition, states that Walter Humphrey, Howard Baker, Earl Surface, Ross Johnson, Arthur Gilpin and Ray Lewis are all employees of E & L Transport Company, and together with other [fol. 44] employees of said Firm, in circumstances similar to the above-named employees of E & L Transport and will be prejudice if the relief sought by the plaintiffs in

this action is granted by this Court and said parties, by direction of Court, are named as defendants in this action.

Wherefore, it is prayed that this Amended Complaint be filed and that the relief sought in the original Complaint filed herein by plaintiff be granted.

John Young Brown, Michael J. Clare.

[fol. 54]

IN JEFFERSON CIRCUIT COURT

CHANCERY BRANCH, FIRST DIVISION

No. 61535

[Title omitted]

MOTION TO DISMISS BY DEFENDANT, GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 89

Comes the Defendant, General Drivers, Warehousemen and Helpers, Local Union No. 89, and moves the Court to require the Plaintiff to amend its Complaint to show the proper name of said Defendant and said Defendant further moves the Court to Dismiss the Complaint against it herein, because said Complaint does not state facts sufficient to constitute a cause of action against it.

Hardy, Logan & Tross, 506 West Jefferson Street, Louisville 2, Kentucky, JUniper 3-8371, By Ralph H. Logan.

Certificate of service (omitted in printing).

[fol. 55]

IN JEFFERSON CIRCUIT COURT

CHANCERY BRANCH, FIRST DIVISION

CR 61535

[Title omitted]

ORDER SUSTAINING MOTION TO QUASH SERVICE OF SUMMONS AND OVERRULING MOTION FOR TEMPORARY INJUNCTION—November 24, 1961

This action having been tried to the Court on November 18 and November 24 on plaintiffs' motions for a temporary injunction, and the Court having heard the arguments of counsel, and being advised,

It Is Ordered as follows:

1. That the motion to quash the service of summons on the defendant, "International Brotherhood of Teamsters, Chauffeurs, etc.," served November 18, 1961, by delivering a copy to Paul Priddy, President of Local Union No. 89, be and it is sustained.

2. That the plaintiffs' motion for a temporary injunction against the implementation of the decision or arbitration award of October 18, 1961, by the Automobile Transporters Joint Conference Committee in Detroit be and it is overruled.

November 24, 1961

Macauley L. Smith, Judge.

In this case, the employer, Dealers Transport Company, was engaged as a competitor of E & L Transport Company in the transportation of new cars and trucks from the Ford Motor Company, Louisville assembly plant. Some time in [fol. 56] the Spring of 1961 Ford announced (probably because of the increasing number of its vehicles being transported piggy back by rail carriers) that in the future it would deal only with one of the two. Negotiations followed between the two truckaway carriers, and they determined that, subject to ICC approval, Dealers Transport would take over E & L's routes out of Louisville and E & L would take over certain operations of Dealers in Ohio and out of Memphis.

A grievance by two employees of E & L, who anticipated losing their jobs, was filed with Local 89 which represented the (Louisville) employees of both employers. Without decision in Louisville, these grievances were forwarded to Detroit for hearing by the Automobile Transporters Joint Conference Committee. Plaintiffs complained that up until a few moments of the hearing in Detroit they were led to believe by the President of Local 89, Paul Priddy, and his chief agent (with respect to these two employers) Les Atterbury, that the position of Dealers Transport employees would be furthered by them before the Joint Conference Committee in Detroit; whereas, in fact, Priddy at the hearing made a statement favoring "sandwiching in" of the E & L employees into the Dealers Transport seniority list with the contemplated effect that a number of the latter will lose their seniority and may lose their jobs.

The Joint Conference Committee in Detroit is composed of equal representation of the representatives of labor and of industry, and no contention is made that the pertinent facts with respect to this proposed "merger" or "absorption" of routes were not truthfully disclosed to the Committee. While plaintiff and those whom he represents were disappointed in the action of their Local 89 representatives, there were three shop stewards from Dealers Transport attending the Detroit meeting, and it would be a matter of

idle speculation to assume that the result would have been different had the matter been differently presented. [fol. 57] This Court conceives that the provisions of Article 4, Section 5, Page 14, in the printed Agreement effective March 1, 1961, governed this state of facts instead of Article 4, Section 6, subsection 2 on page 17, of said printed Agreement. This Court cannot follow counsel for plaintiff's argument that the paragraph on page 2 of the four page rider to said contract, providing:—

> "The Louisville domiciled employees of the Employer shall have exclusive rights to all work originating at the Louisville Terminal."—

is determinative of the controversy. When the E & L employees become employees of Dealers Transport, they will be Louisville domiciled employees of the employer, and this Court believes their rights are governed by Article 4, Section 5, mentioned above, and that a binding determination of the controversy was made in Detroit on October 18, 1961.

November 24, 1961

Macauley L. Smith, Judge.

cc: Messrs. John Young Brown, Ralph Logan, Newell N. Fowler (2 copies to each).

[fol. 63]

IN JEFFERSON CIRCUIT COURT

CHANCERY BRANCH, FIRST DIVISION

[Title omitted]

TEMPORARY INJUNCTION ORDER—November 29, 1961

The above styled cause coming on to be heard this 29th day of November, 1961, on appeal to the Court of Appeals of Kentucky from an order of the Jefferson Circuit Court denying the temporary injunction to the plaintiff herein and the court having considered the record and heard the argument of counsel herein and being advised;

It is hereby Ordered and Adjudged that the defendants, Local Union No. 89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and Dealers Transport Company, and each of them, be and they are now and hereby enjoined from putting into effect or enforcing the decision of the Automobile Transporters Joint Conference Committee, which reads as follows:

* * * * * * *

[fol. 64] And further that said temporary injunction shall be effective from this date until further orders of this court, on condition only that the plaintiff file a bond, with surety, in the amount of $50,000 with this court to pay such damages to the defendants, if any, as the said defendants may [fol. 65] sustain by reason of this temporary injunction, if the court shall eventually decide that the plaintiff herein was not entitled to this temporary injunction.

It is further Ordered and Adjudged that any action taken by the defendants herein to enforce the above set out decision shall be revoked and any employees who are members of the class of plaintiffs herein, who have lost their jobs by reason of said decision, shall be reinstated to their jobs pending further orders of the court.

Robt. B. Bird, Judge.

Brown & Father, By John Y. Brown, Attorneys for Plaintiff.

Ralph H. Logan, Attorney for Defendants.

[fol. 68]

IN JEFFERSON CIRCUIT COURT

CHANCERY BRANCH, FIRST DIVISION

No. 61535

[Title omitted]

MOTION TO DISMISS BY DEFENDANTS, WALTER HUMPHREY, ETC. ET AL.

The Defendants, Walter Humphrey, Ross Johnson, Howard Baker, Earl Surface, Arthur Gilpin and Ray Lewis, representative of the class of employees of the E & L Transport Company, move the Court to Dismiss the Complaint and the amended Complaint herein, because it does not state sufficient facts to constitute a cause of action against them.

Hardy, Logan & Tross, 506 West Jefferson Street, Louisville 2, Kentucky, JUniper 3-8371, By Ralph H. Logan, Attorney for Defendants.

Certificate of service (omitted in printing).

[fol. 69]

IN JEFFERSON CIRCUIT COURT

CHANCERY BRANCH, FIRST DIVISION

No. 61535

[Title omitted]

MOTION TO DISMISS BY DEFENDANT, GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 89

Comes the Defendant, General Drivers, Warehousemen and Helpers, Local Union No. 89, and in addition to its Motion to Dismiss heretofore filed in this action, further moves the Court to dismiss the Complaint and the Amended Complaint because the jurisdiction of this Court has been preempted by the provisions of the National Labor Relations Act.

Hardy, Logan & Tross, 506 West Jefferson Street, Louisville 2, Kentucky, JUniper 3-8371, By Ralph H. Logan, Attorneys for Defendant, Local 89.

Certificate of service (omitted in printing).

[fol. 70]

IN JEFFERSON CIRCUIT COURT

CHANCERY BRANCH, FIRST DIVISION

CR 61535

[Title omitted]

JUDGMENT—December 4, 1961

The parties by counsel having agreed that the within action might be submitted in chief to the Trial Court on the proof introduced herein November 18 and 24, 1961, on motion for temporary injunction together with brief additional testimony of Mr. Stovall heard this day, and the Court having considered all of said evidence, for the reasons stated in Memorandum Opinion filed herein on November 24, 1961,

It Is Ordered and Adjudged as follows:

1. That plaintiff's motion for a permanent injunction against the implementation of the decision of the Automobile Transporters Joint Conference Committee in Detroit on October 18, 1961, be and it is overruled.

2. That plaintiff's complaint as amended be and it is dismissed.

3. That defendants recover of plaintiff their costs herein expended.

4. That the order of temporary injunction signed herein on November 29, 1961, by Chief Justice Bird be and it is continued in effect pending the contemplated appeal herein.

December 4, 1961

Macauley L. Smith, Judge.

cc: Messrs. John Young Brown, Ralph H. Logan, Newell N. Fowler.

[fol. 78]
IN COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY

C. W. MOORE, Individually, and for and on behalf of members of the Class, Appellant,

vs.

LOCAL UNION No. 89, ETC. and DEALERS TRANSPORT COMPANY, et al., Appellees.

ORDER ADVANCING APPEAL AND OVERRULING MOTION FOR ORAL ARGUMENT—Entered December 11, 1961

The Court sustained the motion of appellant to advance the appeal herein and said appeal is now advanced.

The Court having considered the motion for an oral argument, and being advised overrules said motion for an oral argument.

It is so ordered.

Entered this December 11, 1961.

Robert B. Bird, Chief Justice.

[fol. 79]
IN COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY

[Title omitted]

ORDER SUBMITTING CASE—December 15, 1961

Came appellant, by counsel, and filed memorandum briefs and notice.

Came appellees, by counsel, and filed memorandum briefs and notice.

The Court being sufficiently advised, the above styled case is ordered submitted December 15, 1961.

[fol. 80]

IN COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY

C. W. MOORE, Individually and for and on Behalf of Members of the Class, Appellants,

vs.

LOCAL UNION No. 89, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AND DEALERS TRANSPORT COMPANY, Appellees.

ORDER GRANTING PERMANENT INJUNCTION —Entered December 15, 1961

This day this cause came on for hearing on appeal and the Court having reviewed and reversed the decision of the Jefferson Circuit Court herein, It Is Now Ordered that the temporary injunction granted by this Court on the 29th day of November, 1961, be made permanent.

And, It Is Further Ordered that the injunction bond, executed by the appellants in the sum of $50,000.00, be and it hereby ordered cancelled, set aside and held for naught.

The opinion herein will be written and rendered at a later date.

Entered this 15th day of December, 1961.

Robert B. Bird, Chief Justice.

[fol. 84]

IN COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY

Modified: May 4, 1962

C. W. MOORE, Appellant,

v.

LOCAL UNION NO. 89, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, et al., Appelles.

Appeal From Jefferson Circuit Court

Chancery Branch—First Division

Hon. Macauley L. Smith, Judge

OPINION OF THE COURT BY JUDGE PALMORE
—Rendered February 13, 1962

Affirming in Part

Reversing in Part

This injunction suit brought as a class action by a member of a labor union questions the right of the union and the plaintiff's employer, Dealers Transport Company, to carry out the terms of a decision relating to job seniority rights. The decision in question was reached through the grievance procedure set forth in a contract between the union and the employer. The chancellor upheld the decision and denied relief.

Dealers Transport Company, of Memphis, Tennessee, and E & L Transport Company, of Detroit, Michigan, were competitors in the transportation of new automobiles and trucks from the Louisville assembly plant of the Ford Motor Company. With the development of multi-level or "piggy-back" railroad shipments they began to lose business, and Ford advised both companies that eventually

there would be room for only one of them. Following discussions over a period of 1½ to 2 years it was agreed be-
[fol. 85] tween Dealers and E & L that E & L would withdraw, leaving the Louisville field to Dealers. This arrangement does not involve the sale or transfer of any equipment, facilities, or other property, but an application has been made to the Interstate Commerce Commission for the transfer to Dealers of E & L's authority to make "secondary" runs out of Louisville. For this transfer Dealers is to pay a nominal consideration covering the expense of the transaction. There was and is no agreement between the companies calling for a transfer of any employees from one to the other.

Because of the increased competition from both rail and water shippers, Dealers and E & L decided also that it would be advisable for each of them to retrench by drawing its operations closer to home. So, at the same time the application was made for a transfer of E & L's secondary authority out of Louisville to Dealers, two other applications were submitted to the I.C.C., as follows:

(1) To authorize the sale and transfer to E & L of Dealers' initial authority out of Lorraine, Ohio, along with physical assets such as tractors, shop equipment, and terminal facilities there located.

(2) To authorize the sale and transfer to Dealers of E & L's secondary authority to serve New Orleans and Shreveport, Louisiana, and Jackson, Mississippi.

It was emphasized in the testimony that each of these proposed transfers is separate, none being contingent on either of the others. All are pending before the I.C.C.

Most if not all of the labor forces at both Dealers and E & L are members of Local Union No. 89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen
[fol. 86] and Helpers of America, which in turn is "affiliated" with two autonomous but apparently interlocking organizations, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and the National Truckaway and Driveaway Conference. For convenience we shall refer to these three organizations as the Local Union, the International, and the National Conference.

The Teamsters Union, as it is commonly called, has represented the employees of E & L and its predecessors in business for over 20 years and has represented the Dealers employees since 1955 or 1956. The National Conference, in behalf of its member local unions, is the exclusive representative of the employees for purposes of collective bargaining, and its standard contract for the period March 1, 1961, to February 29, 1964, printed in booklet form, has been separately executed by Dealers and by E & L. In each instance the agreement is signed by the Local, the National Conference, and the employer, but not by the International as such.

The standard contract secures job seniority rights to the employees. These rights are established, broadly speaking, on a terminal or local rather than a company-wide basis. For example, Article 4, Sec. 1, says: "Terminal seniority shall prevail at all times except as provided for in Article 4, Section 6, Subsection (b)2." The latter subsection provides that if a branch or terminal is closed or partially closed and its work transferred to another branch or terminal an employee transferring from one to the other shall go to the bottom of the seniority board for purposes of job selection but shall exercise his company seniority for lay-off purposes and all other contract benefits. When a new branch or terminal is opened a new seniority board is established, and an employee who transfers to it from another location loses his seniority rights at the old terminal at the end of 2 years. (In the case of [fol. 87] Dealers, which established its Louisville terminal in 1955, there was a special exception under which the first 50 employees transferring from Memphis were permitted, for some reason not disclosed in the record, to carry with them the original seniority dates.)

The standard contract (Article 7, Section 2) further provides a grievance procedure under which "disputes" shall first be taken up between the employer and the local union involved. On their failure to agree the dispute is taken before a "Local Joint Committee" composed of both union and management representatives. If this committee cannot resolve the controversy it may be appealed to a body called the Automobile Transporters Joint Conference

Committee (hereinafter called the Detroit committee), which consists of both labor and industry-wide management representatives. When this panel is unable to agree the matter must be submitted to further arbitration.

Though E & L is still operating in Louisville, in August of 1961, when this controversy developed, a shift of business from E & L to Dealers obviously was taking place. As E & L began to drop its men employment at Dealers increased. Some of the E & L men were taken on by Dealers, but as the layoffs at E & L accelerated it was inevitable that there would be no room at Dealers for any more. Then it was that two of the former employees of E & L filed with the Local Union a grievance claiming that they and other displaced employees of E & L were entitled to employment by Dealers through a merger of the respective seniority lists of the two companies.

Without taking the question up with Dealers (thereby omitting the first step in the grievance procedure), the Local Union submitted it to the Local Joint Committee, where, at the recommendation of one of its members, Paul Priddy, president of the Local Union, it was "deadlocked," meaning that the Local Joint Committee decided to pass [fol. 88] the problem to the Detroit committee for solution. The Dealers employees were disturbed at this turn of events, but their apprehensions were allayed by assurances from Mr. Priddy's assistant that they were protected by their terminal seniority rights and were not in any trouble. Three of these men attended the Detroit hearing, where they expected their interests to be represented and upheld by Mr. Priddy. But, like the innocent little oysters who took the famous walk with the walrus, they were mistaken, for, according to the testimony of Dealers' personnel manager, when Mr. Priddy had suggested to the Local Joint Committee that the grievance be "deadlocked" and sent to Detroit he remarked "That he knew Mr. Hoffa's thinking on matters of this nature and that these men were going to be sandwiched in." (Mr. Hoffa was president of the International, chairman of the National Conference, and chairman of the Detroit committee.)

When the grievance was called on the docket of cases being heard before the Detroit committee, Mr. Priddy, who also was one of the members of that tribunal, vacated the bench, as was customary for the committee members to do when their own cases were involved. At this time he informed the three Dealers employees, to their surprise and consternation, that he was going to take a stand in favor of merging the Dealers and E & L seniority boards. Representing the Local Union, he thereupon proceeded to state the grievance to the Detroit committee and successfully recommend its solution on that basis. The decision of the Detroit committee, announced a few days after the hearing, was to the effect that the seniority registers of Dealers and E & L at Louisville were to be merged within 30 days.

E & L's Louisville terminal evidently is older than that of Dealers, which was established in 1955. This means that by and large the E & L employees will have greater senior- [fol. 89] ity in the event the merger of seniority boards stands. For example, even with the right of the first 50 Dealers men who came from Memphis in 1955 to retain their original Memphis hire-in dates, out of the first 200 men listed on the new board only 58 will be Dealers Men. As a result, on November 25, 1961, just before this suit was filed, Dealers laid off 96 of its Louisville employees who were displaced by former employees of E & L.

The decision of the Detroit committee is being attacked in this case upon the ground that it is so unjust as to imply fraud, or, to put it another way, that it is arbitrary and therefore subject to judicial inquiry and disposition. Specifically, the court is asked to enjoin the Local Union, the International (though it was not, as such, a party either to the contract or the grievance proceedings), and Dealers from carrying into effect the decision of the Detroit committee. Affected E & L employees were made defendants by amendment.

The question has been raised as to the amenability of International to process through service on the president of its affiliated Local Union. Since, however, International was not a party to the contract or the grievance proceeding we believe its connection with the controversy is in-

sufficient to warrant any relief against it. Hence the judgment of dismissal as to International was correct and it is unnecessary to consider the jurisdictional point.

Appellant and his fellow-employees of Dealers rely heavily on one of the provisions of a special rider attached to the contract between Dealers and the Local Union. It reads as follows:

> "The Louisville domiciled employees of the Employer shall have exclusive rights to all work originating at the Louisville Terminal."

[fol. 90] This provision, or its progenitor, grew out of a controversy in Memphis in 1955, when the Memphis employees, during a slack period, sought to displace drivers of loads passing through Memphis from other points of origin. We agree with the chancellor that it is not dispositive of the problem that arose in this case. The real question was whether the E & L drivers are entitled to be employees of Dealers, and the Detroit committee ruled, in effect, that they were. If that is correct, then the rider provision had no more application to their employment than it would have to the hiring of a new employee from any other source.

The contract provision (Article 4, Section 5) on which the Detroit committee based its ruling to the effect that the E & L employees are entitled to employment by Dealers reads as follows:

> "In the event that the Employer absorbs the business of another private, contract or common carrier, or is a party to a merger of lines, the seniority of the employees absorbed or affected thereby shall be determined by mutual agreement between the employer and the Unions involved. Any controversy with respect to such matter shall be submitted to the joint grievance procedure."

It is the theory of the E & L employees that the transfer to Dealers of E & L's secondary runs out of Louisville constitutes an absorption of business and that under this clause Dealers is required to absorb the affected employees

as well as the business. We cannot find any such meaning in the clause. It deals only with seniority, and not with initial employment. Unless and until the absorbing company agrees to take the employees of the company whose business is being absorbed no seniority problem is created, hence this provision of the contract can have no application. It does not require that the absorbing company take these [fol. 91] employees, but only that if it does take them the question of seniority between the old and new employees will be worked out by agreement or else be submitted to the grievance procedure.

It must be remembered that even though Dealers and E & L have signed practically identical contracts with the same union, still they are separate agreements. These two employers, their respective employees, and the union are not all one big happy family living under the same tent. As we see it, the displaced E & L employees can have no greater right to employment by Dealers than they would possess if they belonged to a different union, or to no union at all. Note, for example, that the contractual provision just quoted mentions "the *Unions* involved." (Emphasis added.) Suppose that the E & L men were represented by a different union. Would they have any rights under this contract between Dealers and another collective bargaining agent? Surely not. Nor would it be possible for them to initiate a grievance directed toward a company with which they had never enjoyed an employer-employee relationship. They are strangers to the Dealers contract, and it was not made for their benefit.

Since Article 4, Section 5, had no application under the circumstances of this case we are of the opinion that the question was not arbitrable under the grievance procedure. Arbitrability is an issue of law, which may be determined judicially. See discussion in *Harbison-Walker Refrac. Co.* v. *United Brick & C. Wkrs.*, Ky. 1960, 339 SW 2d 933. But even if it were otherwise, we find the decision of the Detroit committee to be so erroneous, and made under such circumstances, that it was arbitrary.

Before proceeding further let us clarify the position of Dealers, the employer, in this matter. It is neutral. Its [fol. 92] relations with its employees have been highly

satisfactory, and the year ending July 1, 1961, was its best year to date for efficiency as to accidents, cargo-damage, and the like. It has recognized all along that the real controversy here was within the union itself. It feels bound to honor the contract and the "decisions of all agents to the employees who legally work for us." At Detroit it took the position that it was up to the union to decide what to do with the employees. In its November 25 letters to the 96 displaced employees it specifically advised them that their dismissal was "necessary due to Union action whereby the decision was rendered" by the Detroit committee requiring absorption of the E & L seniority list. It seems clear that Dealers was scarcely a real party in interest to the grievance proceeding. The actual antagonists were the E & L men on the one hand and the Dealers men on the other, all union members.

Representing these two antagonistic interests was the same union. It is useless to say that the union did not "represent" anyone in the grievance proceeding. Common sense verifies the testimony in this case to the effect that the men looked to and depended on their union officials to espouse their rights. Otherwise, what legitimate business does a union have in such a proceeding. It would be equally unrealistic to hold that the Dealers employees had representation before the Detroit Committee through the presence of three of their number who made the trip with Mr. Priddy and his assistant. As one of them said, he was only a shop steward and was not prepared or qualified to make a presentation to the national grievance panel. So we have a situation in which two antagonistic interests were represented by the same advocate. This of itself is enough to destroy the traditional presumption in favor of an arbitration award. Moreover, we cannot overlook the fact that [fol. 93] even the influence of the union stood to be enhanced by a decision permitting the employment and seniority of its members to cut horizontally across company lines. Under these particular circumstances the solution of the controversy under the cloak of a spurious "grievance" against a virtually disinterested employer simply will not bear careful scrutiny, and when we view the erroneous decision of the Detroit committee against such a back-

ground we judge it as having been arbitrary and violative of natural justice. Any other conclusion would reduce these employees to the status of pawns instead of free men. So, even though it be considered that the Detroit ruling was made pursuant to Article 7, Section 2(d) of the contract, providing for arbitration of all questions of contract interpretation, it still cannot stand. This result is not in conflict but is consistent with the principles stated in *Smith* v. *Hillerich & Bradsby Co.*, Ky. 1952, 253 SW 2d 629.

The most difficult question in this case is whether the complaint of the suing employee is within the exclusive jurisdiction of the National Labor Relations Board.

Section 10(a) of the Taft-Hartley Act, 61 Stat. 146 (1947), 29 USCA §160(a), empowers the NLRB "to prevent any person from engaging in an unfair labor practice . . . affecting commerce," subject to certain exceptions. Unfair labor practices are defined in Section 8 of the Act, 29 USCA §158. An examination of the latter section convinces us that the controversy in this case does not involve an unfair labor practice. Section 8 (b) (2) makes it an unfair labor practice for a union "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3)." However, the latter subsection is confined to discrimination the purpose of which is "to discourage membership in any labor organization." Obviously, this is not such a case. Whatever may have been [fol. 94] the end result of the actions of the union and the employer, they were not motivated by any of the illicit objects and designs set forth in Section 8 of the Act as constituents of an unfair labor practice. As we see it, what we have here is not a labor dispute, but simply an action to construe and enforce a contract under which the complaining employee and his fellows have certain rights of tenure. By entertaining that action the courts of this state neither intend nor claim to exercise any jurisdiction in the field of national labor policy, which has been delegated by Congress exclusively to the NLRB. We find inferential support in that Congress has expressly authorized the federal courts to adjudicate suits for violation of labor contracts (29 USCA §185), which means that the enforcement of a contract is not within the ken of the NLRB merely because it involves a labor problem.

We recognize that if an activity is "arguably" subject to the Act "the States as well as the federal courts must defer to the exclusive competence" of the NLRB. *San Diego Unions* v. *Garmon*, 1959, 359 U.S. 236, 245, 79 S. Ct. 773, 3 L. Ed. 2d 775. However, we are not convinced that the question in this case is reasonably arguable.

Insofar as it dismissed the action against the International union the judgment is affirmed. Otherwise it is reversed with directions that a judgment be entered in accordance with this opinion.

Judges Moremen and Williams dissenting.

Attorney for Appellant: John Young Brown, Louisville, Ky. (516 Ky. Home Life Bldg.).

Attorneys for Appellees: Ralph H. Logan, Louisville, Ky., Hardy, Logan & Tross (506 W. Jefferson St.); Newell N. Fowler, Memphis, Tenn. (81 Madison Ave.).

[fol. 93]

IN COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY

Winter Term—February 16, 1962

C. W. MOORE, Individually & For and on Behalf of Members of the Class, Appellant,

vs.

LOCAL UNION NO. 89—INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, et al., Appellees.

Appeal from a judgment of the Jefferson Circuit Court Chancery Branch—First Division

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JUDGMENT—Effective February 13, 1962

The Court being sufficiently advised, it seems to them the judgment herein is erroneous in part.

It is therefore considered that insofar as it dismissed the action against the International Brotherhood the judgment is affirmed and otherwise it is reversed with directions that a judgment be entered in accordance with this opinion; which is ordered to be certified to said Court.

It is further considered that the appellant recover from all the appellees, except the International Brotherhood, his cost herein expended.

Judges Williams and Moremen dissent.

Effective date of this order February 13, 1962.

[fol. 96]

IN COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY

[Title omitted]

ORDER RE FILING OF PETITION FOR REHEARING AND NOTICE —March 16, 1962

Came appellees, by counsel, and filed petition for rehearing and notice.

[fol. 98]

IN COURT OF APPEALS OF COMMONWEALTH OF KENTUCKY

[Title omitted]

ORDER OVERRULING PETITION FOR REHEARING—May 4, 1962

The Court being sufficiently advised, the opinion delivered herein is modified on its face, and it is considered that the appellees' petition for rehearing be and the same is hereby overruled.

[fol. 101]

IN JEFFERSON CIRCUIT COURT

Chancery Branch—First Division

No. 61535

C. W. MOORE, individually and for and on behalf of Members of the Class, Plaintiff,

v.

LOCAL UNION NO. 89, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, and DEALERS TRANSPORT COMPANY, Defendants.

Transcript of Testimony—November 18 and 24, 1961 and December 4, 1961

APPEARANCES:

For plaintiff—Messrs. John Young Brown and Michael J. Clare.

[fol. 102] For defendants, Local Union No. 89, etc.—Mr. Ralph H. Logan.

For defendant, Dealers Transport Company—Mr. Newell N. Fowler, Memphis, Tennessee.

* * * * * * * *

[fol. 112] GAYLE ALEXANDER, next called as a witness in behalf of plaintiffs, being first duly sworn, was examined and testified as follows:

[fol. 113] Direct examination.

By Mr. Brown:

1. Your name is Gayle Alexander?
A. That's right.

2. Are you an employee of Dealers Transport?
A. Yes, sir.

[fol. 120] Cross examination.

By Mr. Logan:

[fol. 121] 38. Now you did make this trip as a representative of Dealers to Detroit, did you not?
A. That's correct.

39. What was the purpose of making that trip?
A. Well, I imagine the Union steward is interested in the employees that he represents.

40. Now you and how many other of your Dealers people went to this meeting?
A. Two more.

41. That totals three?
A. That's correct.

[fol. 122] 44. Did you have anything to say at this meeting?
A. Yes, a little bit.

[fol. 128] 76. Now the E. & L. people I believe you say did file a grievance because of their dissatisfaction with the method they were being placed on the seniority list at Dealers, didn't you say that?
A. They filed a grievance to be placed on it, yes.

[fol. 129] 82. It did proceed through normal channels to the Detroit hearing, did it not?
The Court: He doesn't know that. He knows it got there.
A. I know it got there.

83. You were present?

A. I will say this, the decision was rendered from three to five days, I don't know for sure on the amount of time

but it was quite a while, almost a week, so I don't know how that was rendered.

84. But were present in Detroit, I believe?
A. That's correct.

85. And did E. & L. have some people there?
A. Yes, sir.

86. And you did argue your point of view before the Committee, did you not?
[fol. 130] A. Very little.

* * * * * * *

[fol. 131] ROBERT HILL, Next called as a witness in behalf of plaintiffs, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Brown:

1. Your name is Robert Hill?
A. Yes sir.

2. You work for Dealers Transport?
A. Yes, sir.

* * * * * * *

[fol. 132] 7. Are you familiar with the negotiations leading up to the final ruling which has been referred to here as displacing a great many of the employees of Dealers?
A. Yes, sir.

8. What was your connection with the negotiations that led up to this final ruling?
A. I was steward for the Truckaway Department.

* * * * * * *

[fol. 134] 21. Now did you go up to Detroit with the Committee?
A. Yes, sir.

* * * * * * *

[fol. 139] Cross examination.

By Mr. Logan:

. . . . . .

[fol. 140] 51. Haven't Dealers been pulling over E. & L. rights?

A. Not to my knowledge.

52. When you do pull over them will it increase the number of trucks that go over every day?

A. I presume it would.

53. Are you pulling runs now that were formerly pulled by E. & L.?

A. I suppose we are, some of them, yes, sir.

. . . . . .

[fol. 141] 61. Isn't it a fact that Local 89 represents all the members of E. & L. as well as the members at Dealers?

[fol. 142] A. That's what we thought.

62. Isn't it true they are all members of Local 89?

A. That's correct, sir.

63. And E. & L. Transport had exactly the same contract as Dealers had?

A. They had the same book. The rider varies somewhat, I think, a little bit.

. . . . . .

[fol. 143] 67. Did you have anything to say at this meeting in Detroit?

A. Yes, sir, but I was in the same position as Mr. Gayle.

68. You were present?

A. I was present.

. . . . . .

73. You didn't object to—

A. I believe I can say what I said. He said something [fol. 144] about Memphis drivers being brought up here on company seniority, or something to that effect, and I told him that I thought he had signed an agreement that all work originating in Louisville were exclusive rights of

Louisville domiciled employees. I think that's all I said in that meeting. I am sure it is.

74. Did you say that to the Committee in his presence?
A. Yes, sir.

• • • • • • •

[fol. 149] Recross examination.

By Mr. Logan:

• • • • • • •

106. The Union paid all your expenses to Detroit, didn't it?
A. Yes, sir.

107. Both times?
[fol. 150] A. Yes, sir.

• • • • • • •

[fol. 152] 123. Will you tell the Court who Albert D. Matheson is, if you know?
A. I believe he is the legal representative of the employers' side of the Committee in Detroit. I can stand to be corrected in that, but I think that's correct.

124. Now this board in Detroit is composed of both representatives of labor and employers, is it not?
A. That's what I believe, yes, sir.

• • • • • • •

[fol. 158] Mr. Brown: Your Honor, I would like to call Mr. Snites, representative of the defendant, Dealers Transport Company.

Mack Snites, called as if under cross-examination by plaintiffs, being first duly sworn, was examined and testi-
[fol. 159] fied as follows:

Cross examination.

By Mr. Brown:

1. Will you state your name for the record?
A. My name is Mack Snites.

2. Where do you live, Mr. Snites?
A. Memphis, Tennessee.

3. Are you connected with Dealers Transport in any way?
A. Yes, I am.

4. What is your connection?
A. Vice President and General Manager.

• • • • • • • •

[fol. 162] 19. That's all I am asking you, is about the Louisville operation, that's all.

A. For the past two years both E. & L. Transport Company of Kentucky and ourselves have recognized the fact that both of us could not stay in Louisville due to the diminishing traffic caused by 1960, a bad model year 1961, [fol. 163] the institution of multi-level shipments by rail, one of us had to go, there wasn't any question about it. So we got together, and I want to emphasize and re-emphasize, this has been going on now for one and a half or two years, this talk between the two companies. We finally got together after we found out that we both couldn't stay here and stay healthy and the Ford Motor Company told us that this was going to be a one carrier plant.

20. Now let me interrupt you there. Did the Ford Motor Company tell you the basis on which they were going to select the one carrier that represented them?
A. No, sir, they did not.

21. They did not?
A. They did not.

22. Was efficiency of the employees handling their products, did that enter into it?
A. The Ford Motor Company gave us no indication at all that they would pick a carrier on the basis of his financial worth or his competence as a carrier. They just told us that there was only room here for one carrier.

• • • • • • • •

[fol. 164] 26. Which one of the groups did Ford Motor Company select when they selected a carrier?
A. Ford didn't select.

27. Is that right?
A. That's right.

28. I was under the impression they had selected one.
A. No, sir.

• • • • • • •

[fol. 165] 34. All right, go ahead.

A. There has been application made and agreement between E. & L. Transport Company and Dealers Transport Company wherein Dealers Transport Company would purchase the secondary authority out of Louisville, Kentucky, which is now owned by E. & L. Transport Company of Kentucky. The purchase price is naturally a nominal price, which is placed on operating authority and it usually represents that amount of money which it takes to obtain the authority. In this case it is either thirty-five hundred or forty-five hundred dollars.

• • • • • • •

[fol. 166] Cross examination.

By Mr. Logan:

40. Now Mr. Snites, Mr. Brown confines you to what took place in Louisville. Will you explain to the Court the overall transaction which has taken place between Dealers and E. & L.?
A. Yes, I will be glad to.

41. All right.

A. First, let me say that Dealers is a southern carrier domiciled in Memphis. E. & L. is domiciled in Detroit and they are better known, better equipped to service that area and we are better equipped to service the southern area. So with this new method of shipping that the rails have [fol. 167] offered and the fact that Ford is now shipping numerous shipments by boat on the lakes, it became very evident that we were going to have to draw back in, that is, Dealers, into the southern area to better serve Ford and to try to stay alive. And by the same token E. & L. who was spread out from Detroit to New Orleans is going to have to draw back into a designated area. So we filed three

applications before the Commission. We hold the operation authority, initial authority, out of Lorraine, Ohio. So in Application No. 1 we agreed to sell to E. & L. our initial authority out of Lorraine along with certain physical assets in the way of tractors, shop equipment, terminal facilities, and other things. That application and the agreement is before the Commission now. The expiration time for protest has passed. I told you about the second application, the one here, and to kind of offset what we were giving up at Lorraine in the way of revenue as compared to what we could possibly derive at Louisville we also asked for, and E. & L. agreed to sell us, with the Commission's approval, the secondary authority which we needed in the South to serve Jackson, Mississippi, New Orleans, Louisiana, and Shreveport, Louisiana, those being the three Southern rail points that Ford uses. All three applications [fol. 168] are now before the Commission and we are awaiting decision now from the Commission. Does that answer your question?

42. Thank you. Then the operation out of Lorraine, Ohio, in the future will be that of E. & L.?

A. That is depending, of course, on the Commission's approval.

43. If the Commission approves it?

A. Yes, sir.

44. The same as it will be in Louisville, if the Commission approves it?

A. That's correct, sir.

45. Did you have employees in Lorraine, Ohio?

A. Did I have employees?

46. Yes.

A. Yes, I did.

47. What has happened to those employees?

A. As of right now they are still working for Dealers Transport Company.

48. Have any plans been made for them when you quit operation?

A. Yes, sir.

49. What plans have been made?

A. The plans are, and I presume this is correct, that E. & L. will assume our employees up there.

• • • • • • •

[fol. 170] 61. Were you present at the Detroit conference on this matter?

A. Yes, I was.

62. Did you participate?

A. Yes, I did.

63. Did you state your position at the time in the matter?

A. I gave the Committee more or less the same resume of what is happening between the two companies as I have given this morning, yes.

• • • • • • •

[fol. 171] 67. Now, that decision having been rendered, did you set about to put it into effect in Louisville?

A. Yes, sir. The minute I got the decision I immediately got in touch with my Terminal Manager and my Personnel and Safety Manager and told them to comply with the decision, to post it on the bulletin boards so all could see it and to immediately begin to comply with the decision.

• • • • • • •

[fol. 173] 78. I want to call your attention to a section of this agreement that Mr. Priddy relied on in making this decision that cost these Louisville men their jobs, and ask you—I want you to read the first two lines there. Have you taken over, have you absorbed the business of E. & L.?

A. We have absorbed a certain portion of it.

• • • • • • •

[fol. 175] Cross examination.

By Mr. Logan (continued):

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[fol. 176] 89. Have you had any discussion with E. & L. authority and the Commission about going ahead and operating as though it had been approved, pending approval?

A. Yes, sir, and that's contingent on the merger of this board.

90. On the what?

A. On the merger of this board and the outcome of this hearing.

• • • • • • • •

[fol. 204] LESLIE H. ATTERBURY, called by plaintiffs as if under cross-examination, being first duly sworn, was examined and testified as follows:

Cross examination.

By Mr. Brown:

1. Mr. Atterbury, state your name first, state your full [fol. 205] name.

A. Leslie H. Atterbury.

2. And what, if any, connection do you have with the Teamsters Union?

A. Assistant Agent, General Drivers, Warehousemen and Helpers, Local 89.

3. What connection did Local 89 have with the International Union?

A. We are affiliated with the International Union.

4. You are a Local of the International Union, are you not?

A. That is correct.

5. Under whom do you work?

A. Under the supervision of our president, Paul W. Priddy.

• • • • • • • •

[fol. 207] —13. He can explain now. You can explain.

A. I may qualify the instructions. My instructions from Mr. Priddy are to the best of my ability impartially administer the agreement. When I say impartially I mean that the company has certain obligations under the agreement, the men have certain obligations under the agree-

ment. In every instance my instructions are to see that the agreement in its entirety is complied with.

14. And your instructions are to call the thing as you see it honestly between all parts of your group of men, that's your instructions, isn't it?

A. That's correct.

15. And that's what you sought to do in this particular grievance here now, isn't it?

A. Yes, sir.

16. In your conversations with Mr. Joe Clark, and you did have conversations with him, did you not?

A. Very definitely.

17. And with the other men who have testified here, Mr. Hill, Mr. Gayle Alexander, Mr. Barksdale and Mr. Joe Clark, you undertook to tell them what the plain meaning of this contract meant to you prior to this thing going to Detroit, did you not?

A. Yes, sir, and I might contribute this, anyone else in [fol. 208] the employ of Dealers Transport Company that asked a question, most of the questions were hypothetical or "if" questions.

18. That's right.

A. And based on current available information to the best of my ability I gave them an honest answer.

19. That's right. Do you recall a conversation with Mr. Joe Clark here in which you assured him that Dealers Transport employees had nothing to worry about because they were protected by the rider provision of the contract and by the other provisions of this contract, that they had nothing to worry about prior to hearing this grievance?

A. Honestly, sir, I don't think the rider provision of the contract covers this particular case.

20. I didn't ask you what you thought about the rider provision. I asked you, do you remember assuring these men that they were protected by that contract and they had nothing to worry about?

A. Based on current available information.

• • • • • • •

[fol. 209] 23. I don't care what you base it on, that's what you told them, did you not?

Mr. Logan: Let him answer.

A. Your Honor, I think I might clear up any misunderstanding that might be developing. Sir, I am reading from the agreement. First, I have never purported or intended or in any way indicated that I had any authority to settle any controversy over seniority. I think any discussion that I have had with men in relation to the seniority controversy ultimately they were advised that any controversy over the employees' standing on such list, referring to the seniority list, shall be submitted to joint grievance procedure, Article 7 of the agreement. That is a quote from Article 4, Seniority, and I am positive that in no instance have I indicated to anybody that I had the authority vested in me to settle a seniority controversy.

• • • • • • •

[fol. 210] 26. First, tell me if you told them that, then you can make any qualification you want to. Did you tell them that?

A. At various times I said in my opinion they didn't have anything to worry about.

27. That's what I wanted to get at.

A. Now to qualify that I think I should make a certain statement. There was a meeting in which Mr. Williams from Dealers Transport, Mr. Jack Hokmes from E. & L. Transport, Mr. Art Collins from E. & L. Transport, and Elmo Evans from E. & L. Transport advised myself and another agent who participated in the meeting with me, Norman Hubb, that there was no kind of a trade, understanding at all, between management of the two companies. I was advised at that time that Ford Motor Company had seen fit to take the business from one carrier and give it to another carrier. Subsequently and progressively I found out that those were not the true facts. I do believe that those were the facts that were at the disposal of local management. Now those are local management people with the [fol. 211] exception of Mr. Collins who works out of E. & L.'s Dearborn office.

28. Mr. Atterbury, before you gave these men this advice that they had nothing to worry about, did you clear that with Mr. Paul Priddy so that you would be taking on his thinking to these men on this particular controversy?

A. To the best of my recollection, I didn't.

• • • • • • •

[fol. 212] 32. You had discussed it with Mr. Paul Priddy before you went to Detroit?

A. I certainly did. He was aware of the grievance. Actually the grievance was heard and deadlocked.

33. Who deadlocked it?

A. At Kentucky Conference level.

34. Who deadlocked it?

A. The Kentucky Conference of Teamsters, Automobile Transporters Grievance Panel.

35. What individual deadlocked it?

A. Sir, no individual deadlocked it.

36. Were you there?

A. Yes, sir.

37. What individual got up and said in substance that this is a matter for the National Committee, whatever you call it there, to settle and not for the Local? What individual made that statement?

A. Well, I presume several individuals may have made the statement.

38. I don't want several individuals. What individual made that statement at that meeting, Mr. Atterbury? Now [fol. 213] you know it was Paul Priddy, don't you?

A. Paul Priddy and others probably made that statement because it was deadlocked and it was unanimously deadlocked and every man sitting on the panel must have thought it was a matter to be referred to the national level.

39. Who was the first one to announce this is not a matter we can settle but a matter to settle on the national level?

A. Our president who is also president of the Kentucky Conference of Teamsters.

40. What is his name?

A. Paul W. Priddy.

41. So it was Paul W. Priddy that announced the deadlock, wasn't it?

A. It is customary when there is a decision for our president, Mr. Priddy, to announce the decision, sir.

. . . . . .

43. Nobody on that took issue with Paul, did they?

A. No, sir. We don't make practices of taking issue to any decisions because the agreement is clear and specific. [fol. 214] The agreement provides that controversies are settled at certain levels, at the panel level, and certainly we would not take exception to a decision any more than we would take exception to a decision of this Court, sir.

. . . . . .

[fol. 217] 58. That's right. So that up until the time you left Kentucky Mr. Priddy was of the opinion that the E. & L. drivers have no right to transfer, you were of that opinion and you passed that on to the employees at Dealers, didn't you?

A. I think that is substantially true. I would like to add this, sir. It was Mr. Snites' testimony in Detroit, and honestly the first time I was aware that there had been any understanding between management of the two companies in relation to what has happened, sir.

. . . . . .

[fol. 219] 62. Did you let the Dealers employees know that at Detroit you and Mr. Priddy were going to take the opposite view from the opinion which you had given them consistently, all of them, by your own admission here, up to the time they went to Detroit? Did you let them know that they would have no representation there?

A. Sir, first, I won't concede they didn't have representation, because they had equal representation with the other parties to the controversy. There were three stewards from E. & L., three stewards from Dealers. I think all interested parties who I might define as the three stew-

[fol. 220] ards from Dealers and three stewards from E. & L., president Paul Priddy and myself, were simultaneously advised that there was negotiations of some sort and some kind of an understanding between the companies.

63. When did you first get that information?

A. It was in Mr. Snites' testimony. I might contribute this. Prior to that time there were rumors, there were many rumors, none of them confirmed, none of them coming from an authoritative source, who I would define as local management representatives or officials of the company, sir.

• • • • • • •

[fol. 221] 68. All right, up to that time when you heard Mr. Snites testify, you had consistently told all of the Dealers employees that under the contract and precedent in the industry they were safe, until you heard Mr. Snites testify?

A. With qualifications. When discussions would come up, I think in several instances I indicated to them if we had accurate information that this would be my opinion. I think from time to time I also passed on to them some [fol. 222] of the rumors that I had been hearing.

• • • • • • •

[fol. 229] 92. Mr. Priddy sat on the Committee, did he not, that heard this grievance?

A. Sir, the procedure is this. If a member of the Committee has a case he steps down, he don't listen to the facts of the case. Normally a union representative would be presenting the case. He is also not present when a decision is made. In other words, it is mandatory that he not participate in the capacity of a committeeman or be present and participate in a decision of the case that affects his Local Union or that he has personal interest in.

93. And Mr. Priddy was personally interested in this [fol. 230] case and he stepped down?

A. Very definitely.

94. Will you tell the Court whether or not he stepped down before or after he made his statement?

A. Before, sir.

95. You remember that, do you?

A. Oh, very definitely, he presented the case. I think all parties present were aware of the fact that he was not sitting as a committeeman but was presenting the facts that he had at his disposal.

96. It is your memory that he stepped down as committeeman before he made the statement?

A. Definitely, sir.

97. Did anyone representing Local 89 make any argument there before the Committee for the employees of Dealers Transport?

A. Several times Mr. Priddy asked the parties who are the stewards and representatives and the spokesmen of the men from the two companies, if they had anything to say or anything more to contribute.

98. Whom did he make that request of?

A. He was facing them and I presume made it on an unqualified and inclusive basis. He said anyone. I think they were all included, sir.

* * * * * * *

[fol. 234] DAVID E. STOVALL, called by plaintiffs as if under cross-examination, being first duly sworn, was examined and testified as follows:

[fol. 235] Cross examination.

By Mr. Brown:

1. Will you state your full name?

A. David E. Stovall.

2. Mr. Stovall, what, if any, position do you hold with Dealers Transport?

A. I am Personnel and Safety Director for Dealers Transport Company.

* * * * * * *

[fol. 251] 56. I show you a copy of the Automobile Carrier Truckaway agreement and I will ask you if the original of this agreement between Dealers Transport and Local 89 was a signed agreement.

A. I believe, I may be wrong in this, that the signing of this is authorized by—the Union authorizes its negotiating representatives and the company its negotiating representatives to sign the contract, the national agreement.

57. Does anybody else sign it besides someone for Dealers Transport and someone for Local 89?

A. As I say, we authorize, or actually Dealers Transport doesn't sign it or I don't believe they signed that one. [fol. 252] We give power of attorney to our representatives on the negotiating committee in Detroit to sign for us and the Union does the same, I believe, with their people, if I am not mistaken.

58. Who negotiated this contract in Detroit, if you know? Do you know the name of the organization?

A. The representatives which has been referred to heretofore of the Automobile Transporters Labor Division which is in effect the national representatives of the automobile transporting companies and the Union. I don't know the exact designation of their committee. It is a committee. It is formed into a committee which is the last echelon of negotiation in arriving at contracts.

. . . . . .

[fol. 253] 62. All right, sir. Can you tell us then under the terms of this contract who Dealers Transport recognizes as the bargaining agent for its employees covered under this contract?

A. Well, for the purpose of negotiation of the contract or their representative?

63. Their designated representative. Whom did you recognize as the bargaining agent?

A. Well, the negotiating agent is the Driveaway—Truckaway and Driveaway Conference.

64. And that is in Detroit?

A. Yes.

65. And that's whom this contract was negotiated with, is it not?

A. Yes. That's members of the Teamsters Union from the various Local Unions.

• • • • • • •

[fol. 256] 85. Do you know when the last day is that E. & L. will get secondary rights in here?

A. Well, they will have secondary rights until such time as the Commission approves this transfer which we spoke of.

[fol. 257] 86. After the Commission approves that, what happens to E. & L.'s rights?

A. Then we start hauling the secondary, the rights are transferred into our name.

87. Then E. & L. will not be in business in Louisville at all, will they?

A. No, sir, they will not.

• • • • • • •

[fol. 261] PAUL W. PRIDDY, called as a witness in behalf of defendants, Local Union No. 89, etc., being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Logan:

1. Your name is Paul W. Priddy?

A. That's correct.

2. Are you president of General Drivers Local—will you tell the name?

A. General Drivers, Warehousemen and Helpers, Local Union No. 89.

3. How do you procure that office, Mr. Priddy?

A. Through an election each three years by secret ballot.

4. Are all of the officers of Local 89 elected by secret ballot?

A. They are.

[fol. 262] 5. How do the stewards obtain their positions?

A. Through an election at the individual meetings of the individual companies.

• • • • • • • • • •

9. As a local autonomous organization, are you associated or affiliated with the National Truckaway and Drivers Conference?

A. We are through affiliation, yes.

• • • • • • • • •

[fol. 263] 17. Now Mr. Priddy, does your Union represent both the members of the E. & L. Transport Company and Dealers Transport Company?

A. It does.

18. How long has it represented them?

A. In the instance of E. & L. employees who were [fol. 264] formerly Central Truckaway employees some twenty-two or three years, and in the instance of the Dealers Transport employees for the length of time that the Dealers Transport Company at the closing of the Memphis Ford plant at the time they moved here we have been representing the Dealers employees since that time, which I think the time is 1955 or '6, somewhere in that vicinity.

• • • • • • • • •

[fol. 267] 27. Now Mr. Priddy, this dispute that's in question here, have you any prejudices one way or the other against the employees of Dealers Transport or E. & L. Transport?

A. I have none.

28. Is it your duty as president of Local 89 to see that proper grievances are processed when presented?

A. It is.

29. Were grievances presented in this case?

[fol. 268] A. They were.

30. Will you tell the Court, if you know, when the grievances—what grievances were filed and when?

A. I don't have the grievances in front of me, but the record of course speaks for itself. The Baker grievance

and the Ray Lewis grievance were filed and as a result of those grievances being filed is the reason we are here.

31. Well, what happened when the grievances were filed? What was done?

A. When the grievances were filed, they were filed with Mr. Les Atterbury and as required they were properly docketed on the agenda to be heard at the grievance panel.

* * * * * * *

Mr. Brown: Your Honor, our only issue is whether or [fol. 269] not their decision is in violation of this contract. You can put all that in if you want to.

* * * * * * *

33. Mr. Priddy, I will show you a grievance signed by Ray O. Lewis and ask you to state to the Court the date of that grievance.

A. August 14, 1961.

34. Now I will ask you if subsequently that grievance was heard before the Local Committee and, if so, the date and what disposition was made of it?

A. It was heard before the Local Committee on 8-23-61 and deadlocked to Detroit for decision.

35. Now Mr. Priddy, this deadlock to Detroit, is it signed by anyone?

A. Signed by—it also says "Deadlocked to Detroit for interpretation."

36. And signed by whom?

A. Paul W. Priddy and D. E. Stovall.

* * * * * * *

[fol. 270] 38. Mr. Priddy, there has been much discussion here that you personally deadlocked the Local Committee. Will you tell the Court about that?

A. Any person on the grievance committee has a right to make any statements as to his beliefs on the facts pre-[fol. 271] sented that he desires. I made the statement practically, there is no denying it, there was a lot of time spent on it here, but I made the statement that this is a

matter that would probably come under a matter of interpretation and should rightfully be decided by the people who negotiated the contract. I made that statement. There was a unanimous decision of three management people and three labor people to deadlock the case.

39. There has been some testimony here about your membership on the Committee in Detroit. You are a member of that Committee, are you not?

A. I am on the Grievance Panel.

40. Are you permitted to sit on the Panel and hear your cases you present?

A. The answer is no, and any person who is a member of the Panel doesn't sit when decisions are being made in his own case.

41. Is this a rule of the Committee?

A. This is the rule of the Committee.

. . . . . .

[fol. 273] 44. What was your position then and what is it now?

A. I had some contact with these three men outside in the hall, as they say, that's true, because we are all outside in the hall when we are waiting for various cases to [fol. 274] be heard, and I told them then, I said, "If this decision comes out of here on the basis that some of the boys at Dealers and you indicating that you wanted to come, that is to say, that if E. & L. men in this instance would have to go to the bottom of the list or have no job, actually it is a short sighted view because with the change of operations as they are today three months from now or six months from now Dealers Transport may be completely out of the picture and another carrier in, then you too would have no job at that point if this would happen." I said that they should be merged together in the interest in the future too of Dealers and E. & L. to protect the old men to keep their jobs rather than being displaced three months, six months, nine months from now by another group. That's what I said.

. . . . . .

Cross examination.

By Mr. Brown:

. . . . . .

[fol. 276] 51. Did you tell the E. & L. workers that they might as well look for another job, that if Dealers took them over they would be out? Did you tell them that?

A. I told them this, and there is plenty E. & L. men can testify I told them, that if the facts were as we had been told them it looked black for them. Yes, I did, but let me tell you what the facts were.

. . . . . .

A. I had sent Mr. Atterbury out to contact the officials of the two companies to determine on what basis there was going to be a sale, merger, trade or whatever it might be, and he reported back to me that they had told him there were going to be no interchanges, period, and that Ford [fol. 277] Motor Company was cancelling out one and keeping the other. Now based on that state of facts I said to the men, "It looks black. We will keep trying to find the facts." And we found in the Federal Register, not given to us by either management, we found in the Federal Register that one of the companies was buying some of the rights. So during that interim in between everybody was shocked, everybody didn't know for sure what the facts were until they began to assemble the facts. It now has developed in testimony here and up there that there was a trade made, one company for the other, which is a sale.

. . . . . .

[fol. 282] 75. All right.

A. When I appeared before the Committee I read the clauses of the contract and I said that here is a situation where the local union represents both groups of employees. That was my opening statement. And I said this is a difficult thing to handle. Then I read the clauses of the [fol. 283] contract which have been explained here and read into the record here, and I said that in the interest of protecting the old employees now and in the future, because there is no record or no proof that Dealers won't

either be ordered out by Ford or sell out to somebody else six months from now, so in the interest of protecting the long time employees of both the people, especially since the work is being transferred over to this other operation, in effect these people would be following their work, which would have been true had the other company been the successful one to stay. The position wouldn't have been changed on my part, contrary to what some people think. Now this being true I said it is my opinion, and I have no proof of this, I said that these two companies traded out, the one in Lorraine for the one in Louisville, and I said it makes no difference, this is my argument before the group, it makes no difference whether you trade an apple for an orange or whether you trade something else for it, it is a buy just as well as giving money for it. And I said it is my assumption that this is correct. Mr. Snites followed me to the stand and said Mr. Priddy is absolutely correct, we got together and transferred, as he did here the other day, we got together and testified which [fol. 284] one was going to stay and Ford didn't order either one of us out, and that's what was said there, and based on that the Committee made their decision.

76. Now had you resigned as a member of the Committee before you made that beautiful little speech?

A. That's automatic, John.

. . . . . .

[fol. 286] 85. So it would have been a futile thing for some Dealers employees to file another grievance contrary to some agreement you already made?

A. No, I don't think so. You made much contention here, or got witnesses to make much contention, to the fact that the Union was biased, or you attempted to show that, in the decision. Now on what basis were they biased? We represent both people and we don't get any money from one more than the other one, you understand, John. I don't like this assumption that we are biased in the situation. We are neutral, you might say. We have to present the facts and we have to protect people in spite of themselves.

86. You prefer, of course, that these Dealers employees be docile about the matter and let you dominate the situa-
[fol. 287] tion and take it gracefully?

A. If you take this man that's 38th on the list that you are talking about, on the assumption that you are trying to prove here, I say six months from now if Dealers isn't here he won't have a job under your assumption.

86. If you say that?

A. No. Under your assumption he wouldn't have a job if he went to the bottom of the list on a new purchase company. So sometimes you have to protect people in spite of themselves.

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[fol. 322]

DEFENDANTS' EXHIBIT NO. 2

AUTOMOBILE TRANSPORTERS LABOR DIVISION
2150 GUARDIAN BUILDING
DETROIT 26, MICHIGAN

BULLETIN NO. 162

TO: ALL MEMBERS AND LOCAL UNIONS

RE: SENIORITY AND OTHER INTERPRETATIONS MADE BY THE AUTOMOBILE TRANSPORTERS JOINT CONVERENCE COMMITTEE AT THEIR OCTOBER 17, 18 AND 19, 1961 MEETING

The Automobile Transporters Joint Conference Committee had before it several very important problems and/or interpretations at its session on October 17, 18 and 19, 1961. Because of the importance of the Committee's decisions to all of the Industry and Local Unions, we are setting forth the most important decisions in this Bulletin.

TRUCKAWAY, DRIVEAWAY AND LOCAL AGREEMENTS

Seniority

"49. LOCAL UNION NO. 89 (LOUISVILLE) VS. DEALERS TRANSPORT CO. AND E & L TRANSPORT CO. OF KY.

Re: Request of Employees R. L. Lewis and Howard Baker on behalf of themselves and other

former employees of E & L Transport Co. of Ky. as to their seniority rights with Dealers Transport Co. because of the discontinuance of operations in Louisville by E & L Transport Co. of Ky.

"DECISION:

By unanimous vote the Committee held that in accordance with Article 4 and particularly sub-sections 4 and 5 of the Automobile Carrier Truckaway Agreement, Automobile Carrier Driveaway Agreement and the Automobile Carrier City Delivery, Pull-Out, Mounting Service and Yard Agreement and Garage Rider, the Employees of E and L Transport Co. of Ky. and Dealers Transport Company at the Louisville, Kentucky Terminal shall be sandwiched in on master seniority boards using the presently constituted seniority lists and the dates contained therein at Louisville, Kentucky (past practice on layoffs and recalls shall be maintained as in the past).

"1. Presently constituted terminal seniority lists shall apply for seniority purposes recognizing that the first fifty (50) men who came from Memphis, Tennessee to Louisville, Kentucky maintained their original date of hire and took their proper place on the Louisville seniority boards of Dealers Transport Company. Men subsequently who came to Louisville from Memphis went to the bottom of the board at Dealers Transport Company and maintained their seniority for fringe benefits only.

2. This shall be accomplished within thirty (30) days. Copies of this decision shall be posted on the bulletin boards at both companies."

* * * * * * *

[fol. 347] DAVID E. STOVALL, called by plaintiffs as if under cross-examination, having been heretofore duly sworn, was examined and testified as follows:

Cross examination.

By Mr. Brown:

1. Mr. Stovall, have you caused to be mailed to a number of employees of Dealers, letters dismissing them from service with the Dealers Company?

A. Yes, sir, I have dismissed, effective the 25th of November, 1961, ninety-six of our employees based upon this decision which in fact replaced them with other employees from another company, E. & L. Transport Company.

* * * * * * *

[fol. 349] Cross examination.

By Mr. Logan:

* * * * * * *

8. I am not asking you that. Are they laid off from your company at this time?

A. They are laid off, yes, sir.

9. They are not fired?

A. They are not fired; no, sir.

* * * * * * *

[fol. 354] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 355]

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1962

WALTER HUMPHREY, ET AL., Petitioners,

vs.

C. W. MOORE, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—July 17, 1962

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 4, 1962.

Potter Stewart, Associate Justice of the Supreme Court of the United States.

Dated this 17th day of July, 1962.

[fol. 356]

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1962

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION No. 89, Petitioners,

vs.

C. W. MOORE, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—July 17, 1962

Upon Consideration of the application of counsel for petitioner(s),

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Potter Stewart, Associate Justice of the Supreme Court of the United States.

Dated this 17th day of July, 1962.

[fol. 357]

SUPREME COURT OF THE UNITED STATES

No. 407—October Term, 1962

WALTER HUMPHREY, etc., et al., Petitioners,

vs.

C. W. MOORE, etc., et al.

ORDER ALLOWING CERTIORARI—January 21, 1963

The petition herein for a writ of certiorari to the Court of Appeals of the Commonwealth of Kentucky is granted and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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In the Supreme Court of the United States

OCTOBER TERM, 1962

WALTER HUMPHREY, ETC., ET. AL.,
PETITIONERS

v.

C. W. MOORE, ETC., ET. AL., GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 89, AND DEALERS TRANSPORT COMPANY,
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY

H. SOLOMON HOREN
Kentucky Home Life Building
Louisville, Kentucky
WILLIAM S. ZEMAN
1 Grand Street
Hartford, Connecticut
MOZART G. RATNER
1411 K Street, N.W.
Washington, D. C.
Counsel for Petitioners

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WALTER HUMPHREY, ETC., ET, AL.,
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v.

C. W. MOORE, ETC., ET AL., GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 89, AND DEALERS TRANSPORT COMPANY,
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY

Petitioners, Walter Humphrey, Howard Baker, Earl Surface, Ross Johnson, Arthur Gilpin and Ray Lewis, individually and as representatives of a class of employees of E. & L. Transport Company (hereinafter E. & L.), pray that a writ of certiorari issue to review the judgment of the Court of Appeals of Kentucky in a cause captioned *C. W. Moore, etc., et al.* v. *Local Union No. 89, etc., et al.* As parties below (R. 89; 43, Tr. 196-199),[1] petitioners have

[1] The record filed in this Court is in four volumes; the first, containing the pleadings, is designated "Transcript of Record" and is referred to herein by the symbol "R"; volumes I and II and III combined, designated "Transcript of Testimony," contain the testimony and exhibits and are referred to herein by the symbol "Tr." Pagination of the volumes is consecutive, beginning with "R." References herein preceding a semi-colon are to findings; succeeding references are to evidence.

standing to seek certiorari. *International Union of Mine and Smelter Workers* v. *Eagle-Picher Mining & Smelting Co.*, 325 U. S. 335, 338-339.

OPINIONS BELOW

The opinion of the Court of Appeals (R. 84-94), is reported at 356 S. W. 2d 241, and, together with its pertinent orders (R. 63-65, 80), is printed in Appendix A, *infra*, pp. 1a-16a. The opinion, order and judgment of the Jefferson Circuit Court, Chancery Branch, First Division (R. 55-57, 70), are printed in Appendix B, *infra*, pp. 17a-20a.

JURISDICTION

The judgment and order of the Court of Appeals, modifying its order granting permanent injunction (R. 80, 74-76), was entered on February 13, 1962 (R. 83). A petition for rehearing (R. 97), was overruled May 4, 1962 (R. 98). On July 17, 1962, Mr. Justice Stewart entered an order extending until September 4, 1962, petitioners' time to file a petition for writ of certiorari. This Court has jurisdiction under 28 U.S.C. § 1257 (3).

QUESTION PRESENTED

Whether a state court infringes the statutory discretion and authority of the exclusive bargaining representative to bind its constituents, deprives employees of the benefits of statutory exclusive representation, interferes excessively with the federal collective bargaining process and violates the Supremacy Clause of the Constitution of the United States, by prohibiting parties to a collective bargaining contract affecting interstate commerce from interpreting it to require dovetailing of seniority lists upon absorption of one employer's business by another because in the opinion of the court dovetailing unfairly and unjustly deprives employees of the surviving employer of seniority rights secured by the contract.

STATUTE INVOLVED

The relevant provisions of the Labor Management Relations Act, 1947, 61 Stat. 136, 29 U.S.C. 141, et seq., are as follows:

Sec. 8 (d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder * * *.

Sec. 9 (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

Sec. 203 (d) Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement: * * *

Sec. 301 (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT

A. *The uncontested facts*

Dealers Transport Company, of Memphis, Tennessee (hereinafter Dealers), and E. & L., of Detroit, Michigan, rival carriers of new cars and trucks from the Ford Motor Company, Louisville, Kentucky, assembly plant (R. 84; Tr. 166), together with General Drivers, Warehousemen and Helpers, Local Union No. 89 (hereinafter Local 89), representing their Louisville terminal employees (R. 85; 6, 56, Tr. 142, 263-264), are members of a national, multi-employer, multi-local union, collective bargaining unit, having agreed to be bound (Tr. 159-160, 205, 251-252, 263), by the Automobile Carrier Truckaway Agreement, effective March 1, 1961 through February 29, 1964 (hereinafter the "Agreement"), a standard collective bargaining contract negotiated on behalf of authorizing employers by Automobile Transporters Labor Division and on behalf of local unions of the International Brotherhood of Teamsters, Chauffeurs and Warehousemen of America by National Truckaway and Driveaway Conference (R. 86; 19, pp. 3, 81-82, Tr. 119-120, 206, 251-253, 262, 263).[2]

The Agreement provides (R. 19, pp. 22-23, Art. 7, Sec. 2(d)), that "all matters pertaining to the interpretation of any provision of this Agreement, whether requested by the Employer or the Union, must be submitted to the full Committee of the Automobile Transporters Joint Conference Committee," (hereinafter the Committee), composed of an equal number of representatives of management and labor (R. 56; Tr. 188). Article 7 recites (Sec. 2(f), p. 23), that it is "the intention of the parties to resolve all questions of interpretation by mutual agreement," and provides (Sec. 2(e), p. 23), that "Any decision of the * * * Committee shall be final and conclusive and binding upon the Employer and the Union, and the employees involved." The Agreement also contains the following provision (Art. 4, Sec. 5, p. 14):

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[2] Cf. *Teamsters Union* v. *Oliver*, 358 U. S. 283, 284.

> In the event that the Employer absorbs the business of another private, contract or common carrier, or is a party to a merger of lines, the seniority of the employees absorbed or affected thereby shall be determined by mutual agreement between the Employer and the Unions involved. Any controversy with respect to such matter shall be submitted to the joint grievance procedure (ARTICLE 7).

For some time prior to August, 1961, rumors reached Local 89 that Ford had decided, in view of its increased use of "piggy-back" rail transportation, to terminate one of its two Louisville carriers (Tr. 137, 163, 167, 254, 272). When it appeared that E. & L. would be the one to go, Paul W. Priddy, president of Local 89 (Tr. 261), instructed his assistant, Leslie H. Atterbury (Tr. 205), to interview "officials of the two companies to determine [whether] there was going to be a sale, merger, trade or whatever it might be" (Tr. 276). In a conference with local officials of both companies, Atterbury was informed "that there was no kind of a trade understanding, at all, between management of the two companies * * * that Ford Motor Company had seen fit to take the business from one carrier and give it to another carrier." (Tr. 210-211, 277-278). On the basis of this information (Tr. 219, 277), Priddy and Atterbury told the E. & L. men that it looked black for them and urged them to look for other jobs (Tr. 276, 210, 178, 180, 216), and Atterbury assured the Dealers' men that they had nothing to worry about (Tr. 132, 178, 208, 115-116).

Nevertheless, rumors circulated of a deal between E. & L. and Dealers (Tr. 220-222, 254). In August, 1961, two E. & L. employees, representing the class of petitioners herein, filed a grievance invoking Article 4, Section 5, of the Agreement and requesting that E. & L. employees be "sandwiched in" with Dealers' employees on the basis of seniority acquired at E. & L. and its predecessor company (R. 7, 87; Tr. 240, 269). When the grievance came before the local committee (see R. 19, Art. 7, Sec. 2(a) and (b), pp. 21-22; cf. Tr. 268-269), Priddy stated "this is a matter of interpretation and should rightfully be decided by the

people who negotiated the contract" (Tr. 271); whereupon, by unanimous agreement, the matter was "deadlocked" for submission to the full Committee (Tr. 186, 213, 240-243, 270-271). By that time Local 89 had discovered in the Federal Register an application by Dealers to obtain E. & L.'s secondary movement rights out of Louisville (Tr. 243-245). However, since neither company had revealed "that one of the companies was buying some of the rights," Local 89 did not "know for sure what the facts were." (Tr. 277).

Shortly before the hearing before the full Committee, Priddy told the three Dealers' stewards in attendance that he favored dovetailing the seniority lists and that to oppose it, as they wished, was "actually * * * a short sighted view because * * * three months or six months from now Dealers Transport may be completely out of the picture and another carrier in, then you too would have no job * * * ." (Tr. 272-274; 115-116, 135). On the assumption that there had been a trade of operating rights, Priddy urged the Committee to dovetail the seniority lists "in the interest of protecting the long time employees of both people, especially since the work is being transferred over to this other operation, in effect these people would be following their work." (Tr. 283).[3]

Mack Snites, Dealers' Vice President and General Manager, followed Priddy and confirmed that there had been an "understanding between management of the two companies," as to "which one was going to stay"; that "Ford didn't order either one of us out." (Tr. 283-284, 217-220, 163). He explained that, to consolidate geographically, E. & L. had agreed to sell its secondary authority out of Louisville to Dealers in exchange for Dealers' initial au-

[3] Priddy testified that his position would have been the same "had the other company been the successful one to stay" (Tr. 283, 272, 276, 278), and that the opposition of Dealers' employees could not be controlling because "we represent both people. * * * We have to present the facts and we have to protect people in spite of themselves." (Tr. 286). He specifically denied any hostility or bias against Dealers' employees. (Tr. 231, 267, 286).

thority out of Lorraine, Ohio (Tr. 166-168, 170, 217, 220). Snites admitted that pursuant to this trade Dealers "absorbed a certain portion of" the "business of E. & L." (Tr. 173, 283-284; cf. R. 7).

On the basis of this testimony (Tr. 283-284), the Committee issued a decision directing that within thirty days E. & L. employees "shall be sandwiched in" on Dealers' "master seniority boards." (Tr. 322, 324, 332). Dealers acquiesed (Tr. 171) and prepared to comply by replacing 96 junior employees of Dealers with senior E. & L. employees as of November 25, 1961 (Tr. 347-352).

B. *Proceedings below*

On November 8, 1961, C. W. Moore, an employee of Dealers, on his own behalf and on behalf of Louisville terminal employees of Dealers as a class, filed in the Circuit Court of Jefferson County a suit for injunction and damages to prevent Local 89 and Dealers from complying with the decision (R. 4-18; 24-33, 89). Petitioners herein, individually and as representatives of E. & L. employees as a class, were made defendants by amendment (R. 89; 43-44; Tr. 196-199). The gravamen of the complaint was that because E. & L. men, by and large, had more seniority than Dealers' men, dovetailing would result in unfairly displacing Dealers' employees; that a rider to the contract between Dealers and Local 89 (R. 15-18), guaranteed all Louisville job opportunities to Dealers' employees;[4] that Article 4, Section 6(b) 2, p. 15 of the Agreement, dealing with transfers from a closed branch, rather than Article 4, Section 5, dealing with absorption by one carrier of the business of another, was controlling;[5] and that Priddy had deceived plaintiffs as to Local 89's position and failed to represent them by

[4] The pertinent provision of the rider, which had been approved by the National Conference (Tr. 119, 232, 239), reads: "The Louisville domiciled employees of the Employer shall have exclusive rights to all work originating at the Louisville Terminal." (R. 16).

[5] Section 6(b) 2, provides that in cases of branch closings employees of the closed branch "shall go to the bottom of the seniority board."

causing petitioners' grievance to be sustained (R. 9-10). Petitioners and Local 89 moved to dismiss the complaint for failure to state facts sufficient to constitute a cause of action (R. 68, 54) and Local 89 because "the jurisdiction of this Court has been preempted by the provisions of the National Labor Relations Act" (R. 69).

The trial court, after hearing, denied both a temporary and a permanent injunction and granted the motion to dismiss (R. 55, 70). It concurred in the Committee's conclusion that Article 4, Section 5, governed and neither Article 4, Section 6, nor the rider, applied (R. 57). It further observed, "no contention is made that the pertinent facts with respect to this proposed 'merger' or 'absorption' of routes were not truthfully disclosed to the Committee" and "it would be a matter of idle speculation to assume that the result would have been different had the matter been differently presented" (R. 56).

The Court of Appeals, two judges dissenting, reversed. While agreeing with the trial court that either of the provisions relied on by plaintiffs were pertinent (R. 89-90), it concluded that Article 4, Section 5, did not authorize the decision because it "deals only with seniority, and not with initial employment. Unless and until the absorbing company agrees to take the employees of the company whose business is being absorbed no seniority problem is created, hence this provision of the contract can have no application. It does not require that the absorbing company take these employees, but only that if it does take them the question of seniority between the old and new employees will be worked out by agreement or else be submitted to the grievance procedure." (R. 90-91). The court rejected the parties' contrary interpretation on the ground that it was so "erroneous" and "violative of natural justice" as to be "arbitrary." (R. 91, 93).

The court further held that the Union had no "legitimate business" in the interpretation process except as "advocate" and that it was disqualified from participating

in that capacity because the interests of its constituents were in conflict and because its influence "stood to be enhanced by a decision permitting the employment and seniority of its members to cut across company lines." (R. 92-93). Finally, the court held that it had jurisdiction to substitute its interpretation for the parties' (R. 89), because state courts are empowered "to construe and enforce a contract under which [employees] have certain rights of tenure" (R. 94). In its view, absent a claim that denial was predicated upon union membership or activity, vindication of such rights pursuant to state law does not amount to exercise of "any jurisdiction in the field of national labor policy." (R. 94).

REASONS FOR GRANTING THE WRIT

The dovetailing arrangement which the court below set aside is the product of Local 89's performance of its federal duty of fair representation and of the mandatory federal process of collective bargaining. To allow this decision to stand would defeat Congress' object in fostering the entire system under the aegis of federal law. *Teamsters Union* v. *Oliver*, 358 U. S. 283, 294-297. And it would deprive petitioners of the benefits of exclusive representation which the National Act is designed to enable them to enjoy. *Hill* v. *Florida*, 325 U. S. 538.

The power of state courts to enforce contracts cannot, consistently with Congress' purpose, be deemed to include authority to narrow the scope of collective bargaining or stultify the process itself. A state may not enforce individual contracts incompatibly with the statutory authority and responsibility of the exclusive bargaining representative. *J. I. Case Co.* v. *NLRB*, 321 U. S. 332, 337. *A fortiori*, state power to enforce collective agreements (*Charles Dowd Box Co.* v. *Courtney*, 368 U.S. 502), must be similarly limited, for the details of those contracts themselves express "the paramount force of the federal law." *Oliver* case, *supra*, at pp. 296-297; *Teamsters Local* v.

Lucas Flour Co., 369 U. S. 95, 103-104. Invocation of Section 301 as a sword against collective agreements[6] (R. 94), does indeed "turn the blade inward"; denial that the decision encroaches upon national labor policy at all simply ignores the principles of which that policy is composed.

1. As this Court observed in *Association of Westinghouse* v. *Westinghouse Electric Corporation*, 348 U. S. 437, 459, "[w]hen the employer and the union are in disagreement the question is * * * the extent to which the one may conclude the other." Federal law allocates to the exclusive bargaining representative power to make prospective as distinguished from retroactive adjustments involving interpretation and application of an existing agreement. *Elgin, Joliet & Eastern R. Co.* v. *Burley*, 325 U. S. 711, 739-740. Since petitioners' grievance involved future employment opportunities only, an adjustment binding upon all its constituents was within the province of the exclusive representative.[7] Denial of finality by a state court alters the federal line of demarcation between the authority of the bargaining representative and its constitutents.

2. Federal law precludes attaching to seniority benefits the status of vested rights in any sense which would impair the freedom and authority of the exclusive representative to bargain about them at any time. *Aeronautical Industrial Dist. Lodge 727* v. *Campbell*, 337 U. S. 521, 525-527; *Ford Motor Company* v. *Huffman*, 345 U. S. 330,

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[6] "Parties to a contract may agree as to its meaning. * * * That is what the interpretation here amounted to." *Edelstein* v. *Duluth, M. & I. Ry. Co.*, 225 Minn. 508, 31 N. W. 2d 465, 472.

[7] *Lewellyn* v. *Fleming*, 10 Cir., 154 F. 2d 211, 214; *McMullans* v. *Kansas, Oklahoma and Gulf Railway Co.*, 10 Cir., 229 F. 2d 50, 56, cert. denied 351 U. S. 918; *Union News Company* v. *Hildreth*, 6 Cir., 295 F. 2d 658, 664-667; *Brotherhood of Railroad Trainmen* v. *Texas & P. Ry. Co.*, 5 Cir., 159 F. 2d 822, 826-827, 828; *Roberts* v. *Western P. R. Co.*, 142 Cal. App. 2d 317, 298 P. 2d 120, 123, cert. denied, 352 U. S. 937; *Edelstein* v. *Duluth M. & I. R. Ry. Co.*, 225 Minn. 508, 31 N. W. 2d 465, 472-473; *Napier* v. *System Federation No. 91, Etc.* (W. D. Ky.), 127 F. Supp. 874, 888-889; *Fagan* v. *Pennsylvania R. Co.* (M. D. Pa.), 173 F. Supp. 465.

337-339, 342-343; cf. *Kent* v. *Civil Aeronautics Board*, 2 Cir., 204 F. 2d 263, 266, cert. denied, 346 U. S. 826.* Seniority benefits, like others derived from collective bargaining, are subject to restriction in the "continuous process" (*Campbell* case, *supra*, 337 U.S., at 525), of modification, interpretation and enforcement of the contract. *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192, 202; *Hughes Tool Co.* v. *NLRB*, 5 Cir., 147 F. 2d 69, 72-73. To permit states to immunize them would seriously impair the utility of collective bargaining as an instrumentality of industrial peace.

3. Resolution of conflicts over tenure, whether created by merger, absorption or otherwise, is the federal function of the exclusive bargaining representative.

"When the interests of several groups conflict, or future needs run contrary to present desires, or when the individual's claim endangers group interests, the [exclusive bargaining representative's] function is to resolve the competition by reaching an accommodation or

* There is widespread recognition that seniority rights are susceptible not only to interpretation but to change by agreement of the bargaining agent and the employer. *E. g.*, *Colbert* v. *Brotherhood of Railroad Trainmen*, 9 Cir., 206 F. 2d 9; *Hardcastle* v. *Western Greyhound Lines*, 9 Cir., 303 F. 2d 182, 188; *Pelicer* v. *Brotherhood of Railway & Steamship Clerks*, 5 Cir., 217 F. 2d 205, affirming S. D. Fla., 118 F. Supp. 254, cert. denied, 349 U. S. 912; (but cf. *Woodward Iron Co.* v. *Ware*, 5 Cir., 261 F. 2d 138); *Elder* v. *N. Y. Central R. Co.*, 6 Cir., 152 F. 2d 361, 364, 365; *Spires* v. *Southern Ry. Co.*, 4 Cir., 204 F. 2d 453; *Starke* v. *New York, Chicago & St. Louis R. Co.*, 7 Cir., 180 F. 2d 569; *Johnson* v. *Archer-Daniels Midland Co.* (E. D. Mich.), 203 F. Supp. 636, 638, 640; *Giordano* v. *Mack Trucks, Inc.* (D. N.J.), 293 F. Supp. 905; *Donovan* v. *Travers*, 285 Mass. 167, 188 N. E. 705, 707; *Cortes* v. *Ford Motor Co.*, 349 Mich. 108, 84 N. W. 2d 523; *Walker* v. *Penn-Reading S. Lines*, 142 N. J. Eq. 588, 61 A. 2d 453, 462-463; *Coley* v. *Atlantic Coast Line R. Co.*, 221 N. C. 66, 19 S. E. 2d 124; *Roberts* v. *Western P. R. Co.*, 142 Cal. App. 2d 317, 298 P. 2d 121, 123, cert. denied, 352 U. S. 937; *Brotherhood* v. *Girard Lodge*, 384 Pa. 248, 120 A. 2d 523, 528; *Pratt* v. *Wilson Trucking Co.*, 214 Ga. 385, 104 S.E. 2d 915; see also, *Oddie* v. *Ross Gear & Tool Co.*, 6 Cir., decided July 16, 1962,—F. 2d—, 45 C.C.H. L. C. par. 17, 728, p. 27186; *Zdanok* v. *Glidden Company*, 2 Cir., 288 F. 2d 99, 103, aff'd without consideration of this issue, 307 U. S. 530. In *Zdanok*, the Second Circuit considered seniority vested as against the employer but not as against the exclusive representative. The court below, in contrast, considers seniority vested as against the exclusive representative but not against the employer. See p. 8, *supra*, ¶, infra.

striking a balance. * * * A large part of the daily grist of union business is resolving differences among employees poorly camouflaged as disputes with the employer. * * * ." Cox, *Rights Under a Labor Agreement*, 69 Harv. L. Rev. 601, 626, 627.

The only limitation which federal law imposes upon the representative's authority is the correlative prohibition against "hostile discrimination" based on union membership or activity (*Local 357, International Brotherhood of Teamsters* v. *NLRB*, 365 U. S. 667, 675-676), or other "irrelevant" or "invidious" factors. *Steele* case, *supra*, 323 U. S., at 202, 204.; *Conley* v. *Gibson*, 355 U. S. 41, 46. The court below recognized the preemptive effect of the prohibition against discrimination based on union membership or activity, but it overlooked both the power of the representative to resolve conflicts of interest among its constituents and the correlative duty of fair representation, with their "inescapable implication of exclusiveness." *Gass* v. *Utah Labor Relations Board*, 353 U. S. 1, 10. There is "no room in this scheme" for "state policy limiting the solutions that the parties' agreement can provide." *Oliver* case, *supra*, 358 U. S., at 296; *Ostrofsky* v. *United Steelworkers of America*, D. Md., 171 F. Supp. 782, aff'd, 4 Cir., 273 F. 2d 614, cert. denied, 363 U. S. 849.

"The merger of two companies like the consolidation of once-separate operations into a single plant often gives rise to sharp conflicts of interest in working out the relative seniority rights of two once-separate groups of employees but the courts have invariably—and wisely—refused to become entangled in the merits of a conscientiously negotiated solution." Cox, *The Duty of Fair Representation*, 2 Vill. L. Rev. 151, 161.

Of course when job opportunities or security are diminished, no solution can satisfy all of the employees. But, "it is not violative of federal law that a union not satisfy all employees or that it improperly balance the rights and obligations of the various groups it represents." *Cunningham* v. *Erie Railroad Company*, 2 Cir., 266 F. 2d 411, 417. Dovetailing "on the basis of each employee's length of serv-

ice with his original employer * * *" is generally, indeed, considered the most equitable solution. Kahn, *Seniority Problems in Business Mergers*, 8 Ind. and Lab. Rel. Rev. 361, 378 (1955); *Kent* v. *Civil Aeronautics Board*, 2 Cir., 204 F.2d 263, 266, cert. denied, 346 U.S. 826; *Outland* v. *C.A.B.*, D.C. Cir., 284 F.2d 224, 226. That employees of one employer have longer service than employees of the other does not make that solution discriminatory. *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 337-339. "The seniority principle necessarily adversely affects some employees, particularly the younger employees." *McMullans* v. *Kansas, Oklahoma and Gulf Railroad Co.*, 10 Cir., 229 F.2d 50, 53, cert. denied, 351 U.S. 918. "Nothing in the * * * Act * * * so limits the vision and action of a bargaining representative that it must * * * limit seniority clauses solely to" (*Huffman* case, *supra*, at 343), employees of a single employer. Dovetailing is as common as merger and absorption are widespread.[9]

Both the National Labor Relations Board and the courts hold that dovetailing is within the ambit of the exclusive representative's statutory authority and discretion. *NLRB* v. *Wheland Company*, 6 Cir., 271 F.2d 122, 124-125; *Holman* v. *Industrial Stamping & Manufacturing Co.*, E.D. Mich., 142 F.Supp. 215, 218; Administrative Ruling of the General Counsel, Case No. SR-1973, May 17, 1962, 50 LRRM 1360.[10] Cf. *Local 483, Inter. Bro. of Boilermakers, Etc.* v.

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[9] Where, as in the transportation industry, "there is frequently consolidation and pooling of operations" the "practice * * * is generally to protect employees, to the extent possible, against loss of seniority as a result of the merger." 2 BNA, *COLLECTIVE BARGAINING—NEGOTIATIONS AND CONTRACTS* (5-26-61), 75:201. "Every industry with seniority practices has encountered seniority integration disputes at least sporadically, while some, especially in transportation, have been plagued by them. Although no satisfactory aggregate statistics are available on the frequency or magnitude of these disputes, they constitute an important industrial relations problem." Kahn, *op. cit., supra*, at pp. 362, 363.

[10] Accord: *Colbert* v. *Brotherhood of Railway Trainmen*, note 8, *supra*; *Pagan* v. *Pennsylvania R. Co.*, note 7, *supra*; *Brotherhood* v. *Girard Lodge*, note 8, *supra*; *Walker* v. *Penn-Reading S. Lines*, note 8, *supra*; *Pratt* v. *Wilson Trucking Co.*, note 8, *supra*.

NLRB, D.C. Cir., 288 F.2d 166, cert. denied, 368 U.S. 832. To upset dovetailing, "arbitrariness * * * of the bad faith kind, * * * [s]omething akin to factual malice" (*Cunningham* v. *Erie Railroad Company*, 2 Cir., 266 F.2d 411, 417); "an intent to hostilely discriminate against a portion of the union's membership" (*Hardcastle* v. *Western Greyhound Lines*, 9 Cir., 303 F.2d 182, 185), must be shown. There is neither allegation, evidence nor finding of that here.[11] This solution is "not one of a sort which Congress has indicated may be left to prohibition by the several States." *Oliver* case, *supra*, 358 U.S., at 296. "What is under the 'protection' of the federal Act in this case is the freedom to resolve at the bargaining table the problem of * * * seniority rights raised by [Dealers' absorption of E. & L.'s routes]. * * * To enjoin defendants * * * would be to unduly restrict that freedom of collective bargaining which the Supreme Court has declared to be one of the paramount objectives of the Federal Act." *Holman* v. *Industrial Stamping Co.*, 344 Mich. 235, 74 N.W. 2d 322, 331.

4. The assumption that Local 89 was handcuffed by the conflict of interest between its constituents ignores not only the exclusive bargaining agent's legislative role, but its administrative function as well. To withhold from the bargaining agent authority to enforce the collective agreement against some of its members denies it power to protect the rights of others who, like petitioners, have a "meritorious grievance [which] is entitled * * * to [its] aid and countenance * * *." *Hughes Tool Co.* v. *NLRB*, 5 Cir. 147 F. 2d 69, 74; cf. Tr. 267. Barring the representative from determining whether a grievance has merit because a decision

[11] It is therefore unnecessary to reach the question reserved in *Huffman*, 345 U. S. 330, 332, note 4, whether breach of the duty of fair representation by hostile discrimination on grounds unrelated to union membership or activity is remediable in the first instance by the courts or exclusively by the NLRB. Cox, *The Duty of Fair Representation*, 2 Vill. L. Rev. 151, 172; *Holman* v. *Industrial Stamping* Co., 344 Mich. 235, 74 N. W. 2d 322, 333. It is reported that the General Counsel of the NLRB has for the first time authorized issuance of a complaint charging breach of that duty by discriminatory failure to process a grievance on racial grounds. BNA, 50 L.R.R. No. 33, "Summary of Developments," Aug. 27, 1962, p. 1.

one way rather than another will enhance its institutional prestige (R. 92-93), negates the teaching of this Court that the only enhancement prohibited "is that which is accomplished by discrimination." *Local 357, International Brotherhood of Teamsters* v. *NLRB*, 365 U.S. 667, 675, 676. Cf. *Aeronautical Lodge* v. *Campbell, supra.* Impairment of the ability of the bargaining agent to afford "protection of employee rights already secured by contract" *(Conley* v. *Gibson*, 355 U.S. 41, 46), "frustrates the effort of Congress to stimulate the smooth functioning of [the collective bargaining process and] thus strikes at the very core of federal labor policy." *Teamsters Union* v. *Lucas Flour Co.*, 369 U.S. 95, 104.

The suggestion that Local 89 owed plaintiffs notice of the position it would take on petitioners' grievance (R. 88), likewise misconceives the statutory scheme. "The bargaining agent is * * * not required to consult with the individual members or give them notice of contemplated contractual actions within the scope of its authority. It has the authority to bind its principal, if it acts within the statutory provisions." *McMullans* v. *Kansas, Oklahoma & Gulf Railway Co.*, 10 Cir., 229 F.2d 50, 56, cert. denied, 351 U.S. 918; *Outland* v. *C.A.B.*, D.C. Cir., 284 F.2d 224, 226; *Fagan* v. *Pennsylvania R. Co.*, M.D. Pa., 173 F.Supp. 465, 473; *Coley* v. *Atlantic Coast Line R. Co.*, 221 N.C. 66, 19 S.E.2d 124, 126. To vitiate an agreement for lack of notice "would becloud collective bargaining with an invitation to the use of evasive tactics rather than clarity and purpose and would place the courts in constant attendance at the bargaining table * * *." *Napier* v. *System Federation No. 91, Etc.*, W.D. Ky., 1955, 127 F.Supp. 874, 891. Even if there had been a "misrepresentation"[12] of Local 89's position, the

[12] The insinuation of deception against Local 89's officers is as lacking in factual basis as the simile in which it is cast (R. 88). Those officers consistently explained both to Dealers' and to E. & L.'s employees that dovetailing would depend on whether or not there was a merger or absorption of E. & L.'s business by Dealers (Tr. 132, 208). As far as the record shows, their predictions were honestly based upon "current available information" (Tr. 207, 208, 210, 214, 216-217, 219-222, 226-227, 283-284).

court below would not have been entitled to disturb the agreement. *Durandetti* v. *Chrysler Corp.*, E.D. Mich., 195 F.Supp. 653, 655-656.

5. The decision below not only substitutes state law for federal, it defeats Congress' preference for the bargaining table over the courtroom as the forum for interpretation and application of collective agreements. Congress made it mandatory for the contracting parties to attempt to reach agreement on all questions "arising * * * under" collective agreements without outside intervention. Section 8(d). Resort to arbitration is encouraged only where the contracting parties are unable to agree among themselves. If courts "have no business weighing the merits of a grievance, considering whether there is equity in a claim, or determining whether there is particular language in the written instrument which will support the claim" *(United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 568), when the parties are in disagreement, *a fortiori*, have they no business doing so when the contracting parties agree. To read the *Steelworkers'* cases as denying legal effect to an interpretation agreed on by the contracting parties, as the Sixth Circuit did in the *Riss* case,[18] is "inconsistent with the Act's terms, purposes and legislative history" (*Elgin, Joliet & Eastern R. Co.* v. *Burley*, 325 U.S. 711, 720-721; cf. *Alabaugh* v. *Baltimore & Ohio Railroad Company*, 4 Cir. 222, F. 2d 861, 867); it overlooks that encouragement of arbitration is a supplement to, not a substitute for, encouragement of collective bargaining.

6. Not alone in undertaking to substitute its interpretation of the contract for the parties', but in its interpretation as well, the court below violated national policy. To establish its predicate the court was compelled to fragmentize the federal multi-employer bargaining unit. Cf. *NLRB* v. *Truck Drivers Local 449*, 353 U.S. 87, 94-96. It did this by treating

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[18] *General Drivers, Warehousemen and Helpers, Local Union No. 89, et al. v. Riss Company*, 298 F. 2d 341, pending on petition for writ of certiorari, No. 180, this Term.

the fact that each employer and local union signed a separate copy of the printed contract as creating separate contract relationships. The National Labor Relations Board, on the other hand, treats such signatures merely as evidence of "consent to be bound" by the uniform contract and membership in the multi-party unit.[14]

The court's interpretation of Article 4, Section 5, leaves its applicability to the option of the absorbing employer. That defeats the plain intention of the parties to make it a binding commitment. *Great Lakes & St. L. T. Co.* v. *Scranton Coal Co.*, 7 Cir., 239 Fed. 603, 607. The sole justification offered is that "any other conclusion would reduce these employees to the status of pawns instead of free men" (R. 93). But the court's interpretation makes them "pawns" of the employer. Thus, the entire "practice and philosophy of collective bargaining" is destroyed for the sake of short run "individual advantages • • • paid at the long range expense of the group as a whole." *J. I. Case Co.* v. *NLRB*, 321 U.S. 332, 338-339. Just as an arbitrator cannot be permitted "to dispense his own brand of industrial justice" (*United Steelworkers* v. *Enterprise W. & C. Corp.*, 363 U.S. 593, 597), neither can a court.

CONCLUSION

If it is important to safeguard the province of outsiders to whom contracting parties refer questions of interpretation and application when they cannot agree, *a fortiori* is it important to protect the province of the parties to agree. Promotion of voluntary agreement is the heart of the collective bargaining policy, encouragement of arbitration only supplementary. Since the "complete satisfaction of all who are represented is hardly to be expected" (*Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 338), to permit a voluntary agreement to be upset at the instance of disgruntled

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[14] *Neville Foundry Company*, 122 NLRB 1187, 1188; *Charles H. Harper and Frank Harper*, 117 NLRB 1031, 1032; NLRB, *Twenty Fourth Annual Report* (Govt. Print. Off., 1960), p. 40.

employees absent proof that they are victims of hostile discrimination is to make "the bargaining process • • • a mirage, without the efficacy contemplated by the philosophy of the law which makes its use compulsory." *Union News Co.* v. *Hildreth*, 6 Cir., 295 F. 2d 658, 664. Accordingly, this petition for writ of certiorari should be granted and the judgment below reversed.

Respectfully submitted,

H. Solomon Horen
Kentucky Home Life Building
Louisville, Kentucky

William S. Zeman
1 Grand Street
Hartford, Connecticut

Mozart G. Ratner
1411 K Street, N.W.
Washington, D. C.
Counsel for Petitioners

August, 1962.

APPENDIX A

ORDERS—KENTUCKY COURT OF APPEALS

FALL TERM, DECEMBER 1, 1961

JEFFERSON CIRCUIT COURT

C. W. MOORE, Individually and for and on behalf of members of the Class, *Plaintiffs*

Vs: No.....

LOCAL UNION No. 89, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFERS, WAREHOUSEMEN AND HELPERS OF AMERICA, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFERS, WAREHOUSEMEN AND HELPERS OF AMERICA AND DEALERS TRANSPORT COMPANY, *Defendants*

TEMPORARY INJUNCTION

The above styled cause coming on to be heard this 29th day of November, 1961, on appeal to the Court of Appeals of Kentucky from an order of the Jefferson Circuit Court denying the temporary injunction to the plaintiff herein and the Court having considered the record and heard the argument of counsel herein and being advised;

It is hereby ORDERED AND ADJUDGED that the defendants, Local Union No. 89, General Drivers, Warehousemen, Helpers and Dealers Transport Company, and each of them, be and they are now and hereby enjoined from putting into effect or enforcing the decision of the Automobile Transporters Joint Conference Committee, which reads as follows:

"LOCAL UNION NO. 89 (LOUISVILLE) VS. DEALERS TRANSPORT CO., AND E & L TRANSPORT COMPANY OF KENTUCKY.

Re: Request of Employees R. L. Lewis and Howard Baker on behalf of themselves and other former employees of E & L Transport Co. of Ky. as to their seniority

rights with Dealers Transport Co., because of the discontinuance of operations in Louisville by E & L Transport Co. of Ky.

DECISION: By unanimous vote the Committee held that in accordance with Article 4 and particularly sub-section 4 and 5 of the Automobile Carrier Truckaway Agreement, Automobile Carrier Driveaway Agreement and the Automobile Carrier City Delivery, Pull-Out, Mounting Service and Yard Agreement and Garage Rider, the employees of E & L Transport Co. of Ky. and Dealers Transport Company at the Louisville, Kentucky Terminal shall be sandwiched in on master seniority boards using the presently constituted seniority lists and the dates contained therein at Louisville, Kentucky (past practice on layoffs and recalls shall be maintained as in the past).

1. Presently constituted terminal seniority lists shall apply for seniority purposes recognizing that the first fifty (50) men who came from Memphis, Tennessee to Louisville, Kentucky, maintained their original date of hire and took their proper place on the Louisville seniority boards of Dealers Transport Co. Men subsequently who came to Louisville from Memphis went to the bottom of the board at Dealers Transport Company and maintained their seniority for fringe benefits only.

2. This shall be accomplished within thirty (30) days. Copies of this de-

cision shall be posted on the bulletin boards at both companies.

And further that said temporary injunction shall be effective from this date until further orders of this court, on condition only that the plaintiff file a bond, with surety, in the amount of $50,000 with this court to pay such damages to the defendants, if any, as the said defendants may sustain by reason of this temporary injunction, if the court shall eventually decide that the plaintiff herein was not entitled to this temporary injunction.

It is further ORDERED and ADJUDGED that any action taken by the defendants herein to enforce the above set out decision shall be revoked and any employees who are members of the class of plaintiffs herein, who have lost their jobs by reason of said decision, shall be reinstated to their jobs pending further orders of the court.

November 29, 1961

/s/ ROBERT B. BIRD,
Judge

ORDERS—KENTUCKY COURT OF APPEALS

Fall Term, December 15, 1961

COURT OF APPEALS OF KENTUCKY

C. W. MOORE, INDIVIDUALLY AND FOR
AND ON BEHALF OF MEMBERS OF THE CLASS, *Appellants*

Vs:

LOCAL UNION NO. 89, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, CHAUFFERS,
WAREHOUSEMEN AND HELPERS OF AMERICA,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFERS, WAREHOUSEMEN AND HELPERS
OF AMERICA, AND DEALERS TRANSPORT COMPANY, *Appellees*

ORDER GRANTING PERMANENT INJUNCTION

This day this cause came on for hearing on appeal and the Court having reviewed and reversed the decision of the Jefferson Circuit Court herein, IT IS NOW ORDERED that the temporary injunction granted by this Court on the 29th day of November, 1961, be made permanent.

And, IT IS FURTHER ORDERED that the injunction bond, executed by the appellants in the sum of $50,000.00, be and it hereby ordered cancelled, set aside and held for naught.

The opinion herein will be written and rendered at a later date.

Entered this 15th day of December, 1961.

/s/ ROBERT B. BIRD,
Chief Justice

RENDERED: February 13, 1962
MODIFIED: May 4, 1962

COURT OF APPEALS OF KENTUCKY

C. W. MOORE, *Appellant*

VS:

LOCAL UNION NO. 89, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, ET AL., *Appellees*

APPEAL FROM JEFFERSON CIRCUIT COURT
CHANCERY BRANCH—FIRST DIVISION
HON. MACAULEY L. SMITH, JUDGE

OPINION OF THE COURT BY JUDGE PALMORE

AFFIRMING IN PART
REVERSING IN PART

This injunction suit brought as a class action by a member of a labor union questions the right of the union and the plaintiff's employer, Dealers Transport Company, to carry out the terms of a decision relating to job seniority rights. The decision in question was reached through the grievance procedure set forth in a contract between the union and the employer. The chancellor upheld the decision and denied relief.

Dealers Transport Company, of Memphis, Tennessee, and E & L Transport Company, of Detroit, Michigan, were competitors in the transportation of new automobiles and trucks from the Louisville assembly plant of the Ford Motor Company. With the development of multi-level or "piggy-back" railroad shipments they began to lose business, and Ford advised both companies that eventually there would be room for only one of them. Following discussions over a period of 1½ to 2 years it was agreed between Dealers and E & L that E & L would withdraw, leaving the Louisville field to Dealers. This arrangement does not involve the sale or transfer of any equipment, facilities, or other property, but an application has been

made to the Interstate Commerce Commission for the transfer to Dealers of E & L's authority to make "secondary" runs out of Louisville. For this transfer Dealers is to pay a nominal consideration covering the expense of the transaction. There was and is no agreement between the companies calling for a transfer of any employees from one to the other.

Because of the increased competition from both rail and water shippers, Dealers and E & L decided also that it would be advisable for each of them to retrench by drawing its operations closer to home. So, at the same time the application was made for a transfer of E & L's secondary authority out of Louisville to Dealers, two other applications were submitted to the I.C.C., as follows:

(1) To authorize the sale and transfer to E & L of Dealers' initial authority out of Lorraine, Ohio, along with physical assets such as tractors, shop equipment, and terminal facilities there located.

(2) To authorize the sale and transfer to Dealers of E & L's secondary authority to serve New Orleans and Shreveport, Louisiana, and Jackson, Mississippi.

It was emphasized in the testimony that each of these proposed transfers is separate, none being contingent on either of the others. All are pending before the I.C.C.

Most if not all of the labor forces at both Dealers and E & L are members of Local No. 89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, which in turn is "affiliated" with two autonomous but apparently interlocking organizations, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and the National Truckaway and Driveway Conference. For convenience we shall refer to these three organizations as the Local Union, the International, and the National Conference.

The Teamsters Union, as it is commonly called, has represented the employees of E & L and its predecessor in

business for over 20 years and has represented the Dealers employees since 1955 or 1956. The National Conference, in behalf of its member local unions, is the exclusive representative of the employees for purposes of collective bargaining, and its standard contract for the period March 1, 1961, to February 29, 1964, printed in booklet form, has been separately executed by Dealers and by E & L. In each instance the agreement is signed by the Local, the National Conference, and the employer, but not by the International as such.

The standard contract secures job seniority rights to the employees. These rights are established, broadly speaking, on a terminal or local rather than a company-wide basis. For example, Article 4, Sec. 1 says: "Terminal seniority shall prevail at all times except as provided for in Article 4, Section 6, Subsection (b)2." The latter subsection provides that if a branch or terminal is closed or partially closed and its work transferred to another branch or terminal an employee transferring from one to the other shall go to the bottom of the seniority board for purposes of job selection but shall exercise his company seniority for lay-off purposes and all other contract benefits. When a new branch or terminal is opened a new seniority board is established, and an employee who transfers to it from another location loses his seniority rights at the old terminal at the end of 2 years. (In the case of Dealers, which established its Louisville terminal in 1955, there was a special exception under which the first 50 employees transferring from Memphis were permitted, for some reason not disclosed in the record, to carry with them the original seniority dates.)

The standard contract (Article 7, Section 2) further provides a grievance procedure under which "disputes" shall first be taken up between the employer and the local union involved. On their failure to agree the dispute is taken before a "Local Joint Committee" composed of both union and management representatives. If this committee cannot resolve the controversy it may be appealed to a body called

the Automobile Transporters Joint Conference Committee (hereinafter called the Detroit committee), which consists of both labor and industry-wide management representatives. When this panel is unable to agree the matter must be submitted to further arbitration.

Though E & L is still operating in Louisville, in August of 1961, when this controversy developed, a shift of business from E & L to Dealers obviously was taking place. As E & L began to drop its men employment at Dealers increased. Some of the E & L men were taken on by Dealers, but as the layoffs at E & L accelerated it was inevitable that there would be no room at Dealers for any more. Then it was that two of the former employees of E & L filed with the Local Union a grievance claiming that they and other displaced employees of E & L were entitled to employment by Dealers through a merger of the respective seniority list of the two companies.

Without taking the question up with Dealers (thereby omitting the first step in the grievance procedure), the Local Union submitted it to the Local Joint Committee, where at the recommendation of one of its members, Paul Priddy, president of the Local Union, it was "deadlocked," meaning that the Local Joint Committee decided to pass the problem to the Detroit committee for solution. The Dealers employees were disturbed at this turn of events, but their apprehensions were allayed by assurances from Mr. Priddy's assistant that they were protected by their terminal seniority rights and were not in any trouble. Three of these men attended the Detroit hearing, where they expected their interests to be represented and upheld by Mr. Priddy. But, like the innocent little oysters who took the famous walk with the walrus, they were mistaken, for, according to the testimony of Dealers' personnel manager, when Mr. Priddy had suggested to the Local Joint Committee that the grievance be "deadlocked" and sent to Detroit he remarked "That he knew Mr. Hoffa's thinking on matters of this nature and that these men were going to be sandwiched in." (Mr. Hoffa was president of the International,

chairman of the National Conference, and chairman of the Detroit committee.)

When the grievance was called on the docket of cases being heard before the Detroit committee, Mr. Priddy, who also was one of the members of that tribunal, vacated the bench, as was customary for the committee members to do when their own cases were involved. At this time he informed the three Dealers employees, to their surprise and consternation, that, he was going to take a stand in favor of merging the Dealers and E & L seniority boards. Representing the Local Unions, he thereupon proceeded to state the grievance to the Detroit committee and successfully recommend its solution on that basis. The decision of the Detroit committee, announced a few days after the hearing, was to the effect that the seniority registers of Dealers and E & L at Louisville were to be merged within 30 days.

E & L's Louisville terminal evidently is older than that of Dealers, which was established in 1955. This means that by and large the E & L employees will have greater seniority in the event the merger of seniority boards stands. For example, even with the right of the first 50 Dealers men who came from Memphis in 1955 to retain their original Memphis hire-in dates, out of the first 200 men listed on the new board only 58 will be Dealers Men. As a result, on November 25, 1961, just before this suit was filed, Dealers laid off 96 of its Louisville employees who were displaced by former employees of E & L.

The decision of the Detroit committee is being attacked in this case upon the grounds that it is so unjust as to imply fraud, or, to put it another way, that it is arbitrary and therefore subject to judicial inquiry and disposition. Specifically, the court is asked to enjoin the Local Union, the International (though it was not, as such, a party either to the contract or the grievance proceedings), and Dealers from carrying into effect the decision of the Detroit committee. Affected E & L employees were made defendants by amendment.

The question has been raised as to the amenability of International to process through service on the president of its affiliated Local Union. Since, however, International was not a party to the contract or the grievance proceeding we believe its connections with the controversy is insufficient to warrant any relief against it. Hence the judgment of dismissal as to International was correct and it is unnecessary to consider the jurisdictional point.

Appellant and his fellow-employees of Dealers rely heavily on one of the provisions of a special rider attached to the contract between Dealers and the Local Union. It reads as follows:

"The Louisville domiciled employees of the Employer shall have exclusive rights to all work originating at the Louisville Terminal."

This provision, or its progenitor, grew out of a controversy in Memphis in 1955, when the Memphis employees, during a slack period, sought to displace drivers of loads passing through Memphis from other points of origin. We agree with the chancellor that it is not dispositive of the problem that arose in this case. The real question was whether the E & L drivers are entitled to be employees of Dealers, and the Detroit committee ruled, in effect, that they were. If that is correct, then the rider provision had no more application to their employment that it would have to the hiring of a new employee from any other source.

The contract provision (Article 4, Section 5) on which the Detroit committee based its ruling to the effect that the E & L employees are entitled to employment by Dealers reads as follows:

"In the event that the Employer absorbs the business of another private, contract or common carrier, or is a party to a merger of lines, the seniority of the employees absorbed or affected thereby shall be determined by mutual agreement between the employer and the Unions involved. Any controversy with respect to such matter shall be submitted to the joint grievance procedure."

It is the theory of the E & L employees that the transfer to Dealers of E & L's secondary runs out of Louisville constitutes an absorption of business and that under this clause Dealers is required to absorb the affected employees as well as the business. We cannot find any such meaning in the clause. It deals only with seniority, and not with initial employment. Unless and until the absorbing company agrees to take the employees of the company whose business is being absorbed no seniority problem is created, hence this provision of the contract can have no application. It does not require that the absorbing company take these employees, but only that if it does take them the question of seniority between the old and new employees will be worked out by agreement or else be submitted to the grievance procedure.

It must be remembered that even though Dealers and E & L have signed practically identical contracts with the same union, still they are separate agreements. These two employers, their respective employees, and the union are not one big happy family living under the same tent. As we see it, the displaced E. & L. employees can have no greater right to employment by Dealers than they would possess if they belonged to a different union, or to no union at all. Note, for example, that the contractual provision just quoted mentions "the *Unions* involved." (Emphasis added.) Suppose that the E & L men were represented by a different union. Would they have any rights under this contract between Dealers and another collective bargaining agent? Surely not. Nor would it be possible for them to initiate a grievance directed toward a company with which they had never enjoyed an employer-employee relationship. They are strangers to the Dealers contract, and it was not made for their benefit.

Since Article 4, Section 5, had no application under the circumstances of this case we are of the opinion that the question was not arbitrable under the grievance procedure. Arbitrability is an issue of law, which may be determined judicially. See discussion in *Harbison-Walker Refrac. Co.*

v. United Brick & C. Wrks., Ky. 1960, 339 SW 2d 933. But even if it were otherwise, we find the decision of the Detroit committee to be so erroneous, and made under such circumstances, that it was arbitrary.

Before proceeding further let us clarify the position of Dealers, the employer, in this matter. It is neutral. Its relations with its employees have been highly satisfactory, and the year ending July 1, 1961, was its best year to date for efficiency as to accidents, cargo-damage, and the like. It has recognized all along that the real controversy here was within the union itself. It feels bound to honor the contract and the "decisions of all agents to the employees who legally work for us." At Detroit it took the position that it was up to the union to decide what to do with the employees. In its November 25 letters to the 96 displaced employees it specifically advised them that their dismissal was "necessary due to Union action whereby the decision was rendered" by the Detroit committee requiring absorption of the E & L seniority list. It seems clear that Dealers was scarcely a real party in interest to the grievance proceeding. The actual antagonists were the E & L men on the one hand and the Dealers men on the other, all union members.

Representing these two antagonistic interests was the same union. It is useless to say that the union did not "represent" anyone in the grievance proceeding. Common sense verifies the testimony in this case to the effect that the men looked to and depended on their union officials to espouse their rights. Otherwise, what legitimate business does a union have in such a proceeding. It would be equally unrealistic to hold that the Dealers employees had representation before the Detroit Committee through the presence of three of their number who made the trip with Mr. Priddy and his assistant. As one of them said, he was only a shop steward and was not prepared or qualified to make a presentation to the national grievance panel. So we have a situation in which two antagonistic interests were represented by the same advocate. This of itself is enough to

destroy the traditional presumption in favor of an arbitration award. Moreover, we cannot overlook the fact that even the advocate must have had an interest of its own, in that the power and influence of the union stood to be enhanced by a decision permitting the employment and seniority of its members to cut horizontally across company lines. Under these particular circumstances the solution of the controversy under the cloak of a spurious "grievance" against a virtually disinterested employer simply will not bear careful scrutiny, and when we view the erroneous decision of the Detroit committee against such a background we judge it as having been arbitrary and violative of natural justice. Any other conclusion would reduce these employees to the status of pawns instead of free men. So, even though it be considered that the Detroit ruling was made pursuant to Article 7, Section 2(d) of the contract, providing for arbitration of all questions of contract interpretation, it still cannot stand. This result is not in conflict but is consistent with the principles stated in *Smith v. Hillerick & Bradsby Co.*, Ky., 1952, 253 SW 2d 629.

The most difficult question in this case is whether the complaint of the suing employee is within the exclusive jurisdiction of the National Labor Relations Board.

Section 10(a) of the Taft-Hartley Act, 61 Stat. 146 (1947), 29 USCA § 160(a), empowers the NLRB "to prevent any person from engaging in an unfair labor practice . . . . . affecting commerce," subject to certain exceptions. Unfair labor practices are defined in Section 8 of the Act, 29 USCA § 158. An examination of the latter section convinces us that the controversy in this case does not involve an unfair labor practice. Section 8 (b) (2) makes it an unfair labor practice for a union "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3)." However, the latter subsection is confined to discrimination the purpose of which is "to discourage membership in any labor organization." Obviously, this is not such a case. Whatever may have been the end result of the actions of the union and the employer,

they were not motivated by any of the illicit objects and designs set forth in Section 8 of the Act as constituents of an unfair labor practice. As we see it, what we have here is not a labor dispute, but simply an action to construe and enforce a contract under which the complaining employee and his fellows have certain rights of tenure. By entertaining that action the courts of this state neither intend nor claim to exercise any jurisdiction in the field of national labor policy, which has been delegated by Congress exclusively to the NLRB. We find inferential support in that Congress has expressly authorized the federal courts to adjudicate suits for violation of labor contracts (29 USCA § 185), which means that the enforcement of a contract is not within the ken of the NLRB merely because it involves a labor problem.

We recognize that if an activity is "arguably" subject to the Act "the States as well as the federal court must defer to the exclusive competence" of the NLRB. *San Diego Unions v. Garmon*, 1959, 359 U.S. 236, 245, 79 S. Ct. 773, 3 L. Ed. 2d 775. However, we are not convinced that the question in this case is reasonably arguable.

Insofar as it dismissed the action against the International union the judgment is affirmed. Otherwise it is reversed with directions that a judgment be entered in accordance with this opinion.

Judges Moremen and Williams dissenting.

ORDERS—KENTUCKY COURT OF APPEALS

Winter Term, February 16, 1962

COURT OF APPEALS OF KENTUCKY

C. W. Moore, Individually, and for and on behalf of members of the class, *Appellants*

Vs:

Local Union No. 89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and Dealers Transport Company, *Appellees*

ORDER MODIFYING THE ORDER GRANTING A PERMANENT INJUNCTION UNDER DATE OF DECEMBER 15, 1962.

The Court having this day rendered its opinion affirming in part and reversing in part this appeal from the Jefferson Circuit Court, now orders and directs that the order granting a permanent injunction dated December 15, 1962, be modified to conform to the opinion of the Court this day delivered.

IT IS SO ORDERED.

Entered this 13th day of February, 1962.

/s/Brady M. Stewart
Chief Justice.

ORDERS—KENTUCKY COURT OF APPEALS

Spring Term, May 4, 1962

Moore, Indiv., etc.,

vs.

Local Union No. 89, etc.
et. al. Jefferson

The Court being sufficiently advised, the opinion delivered herein is modified on its face, and it is considered that the appellees' petition for rehearing be and the same is hereby overruled.

APPENDIX B

CR 61535

JEFFERSON CIRCUIT COURT CHANCERY BRANCH FIRST DIVISION

C. W. MOORE, Individually and for and on Behalf of Members of the Class, *Plaintiffs*

v.

LOCAL UNION No. 89, *et al.*, *Defendants*

ORDER

This action having been tried to the Court on November 18 and November 24 on plaintiffs' motions for a temporary injunction, and the Court having heard the arguments of counsel, and being advised,

IT IS ORDERED as follows:

1. That the motion to quash the service of summons on the defendant, "International Brotherhood of Teamsters, Chauffeurs, etc.," served November 18, 1961, by delivering a copy to Paul Priddy, President of Local Union No. 89, be and it is sustained.

2. That the plaintiffs' motion for a temporary injunction against the implementation of the decision or arbitration award of October 18, 1961, by the Automobile Transporters Joint Conference Committee in Detroit be and it is overruled.

NOVEMBER 24, 1961.

/s/MACAULEY L. SMITH, *Judge*

MEMORANDUM OPINION

In this case, the employer, Dealers Transport Company, was engaged as a competitor of E & L Transport Company in the transportation of new cars and trucks from the Ford Motor Company, Louisville assembly plant. Some time in the Spring of 1961 Ford announced (probably because of

the increasing number of its vehicles being transported piggy back by rail carriers) that in the future it would deal only with one of the two. Negotiations followed between the two truckaway carriers, and they determined that, subject to ICC approval, Dealers Transport would take over E & L's routes out of Louisville and E & L would take over certain operations of Dealers in Ohio and out of Memphis.

A grievance by two employees of E & L, who anticipated losing their jobs, was filed with Local 89 which represented the (Louisville) employees of both employers. Without decision in Louisville, these grievances were forwarded to Detroit for hearing by the Automobile Transporters Joint Conference Committee. Plaintiffs complained that up until a few moments of the hearing in Detroit they were led to believe by the President of Local 89, Paul Priddy, and his chief agent (with respect to these two employers) Les Atterbury, that the position of Dealers Transport employees would be furthered by them before the Joint Conference Committee in Detroit; whereas, in fact, Priddy at the hearing made a statement favoring "sandwiching in" of the E & L employees into the Dealers Transport seniority list with the contemplated effect that a number of the latter will lose their seniority and may lose their jobs.

The Joint Conference Committee in Detroit is composed of equal representation of the representatives of labor and of industry, and no contention is made that the pertinent facts with respect to this proposed "merger" or "absorption" of routes were not truthfully disclosed to the Committee. While plaintiff and those whom he represents were disappointed in the action of their Local 89 representatives, there were three shop stewards from Dealers Transport attending the Detroit meeting, and it would be a matter of idle speculation to assume that the result would have been different had the matter been differently presented.

This Court conceives that the provisions of Article 4, Section 5, Page 14, in the printed Agreement effective March 1, 1961, governed this state of facts instead of

Article 4, Section 6, subsection 2 on page 17, of said printed Agreement. This Court cannot follow counsel for plaintiff's argument that the paragraph on page 2 of the four page rider to said contract, providing:—

> "The Louisville domiciled employees of the Employer shall have exclusive rights to all work originating at the Louisville Terminal."—

is determinative of the controversy. When the E & L employees become employees of Dealers Transport, they will be Louisville domiciled employees of the employer, and this Court believes their rights are governed by Article 4, Section 5, mentioned above, and that a binding determination of the controversy was made in Detroit on October 18, 1961.

NOVEMBER 24, 1961

/s/ MACAULEY L. SMITH, *Judge*

CR 61535

JEFFERSON CIRCUIT COURT CHANCERY BRANCH FIRST DIVISION

C. W. MOORE, *Plaintiff*

v.

LOCAL UNION No. 89, *et al., Defendants*

JUDGMENT

The parties by counsel having agreed that the within action might be submitted in chief to the Trial Court on the proof introduced herein November 18 and 24, 1961, on motion for temporary injunction together with brief additional testimony of Mr. Stoval heard this day, and the Court having considered all of said evidence, for the reasons stated in Memorandum Opinion filed herein on November 24, 1961,

IT IS ORDERED AND ADJUDGED as follows:

1. That plaintiff's motion for a permanent injunction against the implementation of the decision of the Automobile Transporters Joint Conference Committee in Detroit on October 18, 1961, be and it is overruled.

2. That plaintiff's complaint as amended be and it is dismissed.

3. That defendants recover of plaintiff their costs herein expended.

4. That the order of temporary injunction signed herein on November 29, 1961, by Chief Justice Bird be and it is continued in effect pending the contemplated appeal herein.

DECEMBER 4, 1961

/s/ MACAULEY L. SMITH, *Judge*

No. 18

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

GENERAL DRIVERS, WAREHOUSEMAN AND HELPERS, LOCAL UNION NO. 89, *Petitioner*

v.

C. W. MOORE, *et al*, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY

DAVID PREVIANT,
511 Warner Building
Milwaukee 3, Wisconsin
HERBERT S. THATCHER,
DAVID S. BARR,
1009 Tower Building
Washington 5, D.C.
RALPH H. LOGAN,
506 West Jefferson Street
Louisville 2, Kentucky
Counsel for Petitioner

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS LOCAL UNION NO. 89, *Petitioner*

v.

C. W. MOORE, *et al, Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Kentucky Court of Appeals, entered February 13, 1962.

OPINIONS BELOW

The opinion of the Court of Appeals of Kentucky is reported at 356 S.W.2d 241 and is attached hereto, together with the Orders issued by that Court, as Appendix "A". The Orders and opinion of the Jefferson Circuit Court, Chancery Branch, First Division are unreported and are attached hereto in Appendix "B".

JURISDICTION

The judgment and order of the Kentucky Court of Appeals was entered on February 13, 1962, and a Petition for Rehearing was denied on May 4, 1962, making such judgment final. Thereafter, petitioner filed in this Court a timely application for extension of time, which application was granted by the Order of Associate Justice Potter Stew-

art, dated July 17, 1962, extending the time for the filing of this Petition to and including September 4, 1962.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED

1. Whether a state court's jurisdiction over a cause of action against a labor organization for its alleged improper and discriminatory representation of certain employees in an arbitration proceeding is preempted by the exclusive jurisdiction of the National Labor Relations Board, in that the alleged conduct is arguably prohibited by Sections 8 and 9 of the National Labor Relations Act.

2. Whether a state court suit brought by individual employees against a labor organization and an employer, parties to a collective bargaining agreement, to enjoin their enforcement of an arbitration award rendered pursuant to such agreement, is one within the purview of Section 301 of the National Labor Relations Act so as to require the application of federal labor law as the basis of decision.

3. Whether individual employees have standing to bring a Section 301 suit, as aforesaid, in the state courts, although precluded by the statute itself from maintaining such suit in the federal courts.

4. Whether a state court exceeded its jurisdiction and acted contrary to and inconsistently with the national labor policy as established by decisions of this Court under Sections 7, 8, 9 and 301 of the Labor Management Relations Act, in having set aside an arbitration award on the grounds (1) that the arbitration committee had erroneously interpreted a collective bargaining agreement, (2) that the terms of an agreement covering a multi-employer bargaining unit were applicable to the employees of only one and not all of the employers in that unit, and (3) that the union had inadequately represented certain employees in the bargaining unit.

STATUTES INVOLVED

The National Labor Relations Act, 61 Stat. 156, 29 U.S.C. 151 et seq.

Section 7: Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 8: (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly

required as a condition of acquiring or retaining membership;

Section 9:

"Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all of the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment...".

Section 301:

"(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States, having jurisdiction of the parties, without respect to the amount of controversy or without regard to the citizenship of the parties."

"(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in the district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets."

STATEMENT

A. The Facts

The petitioner (defendant-appellee below), General Drivers, Warehousemen and Helpers, Local Union No. 89, (hereinafter referred to as "Local 89"), is an unincorporated association and labor organization representing

employees for the purpose of collective bargaining and is affiliated with the National Truckaway and Driveaway Conference (hereinafter called the "National Conference") and with the International Brotherhood of Teamsters. (R.6).

Dealers Transport Company (herein called "Dealers"), also a defendant-appellee below, is a corporation of the State of Tennessee, having offices at Louisville, Kentucky, and operating a trucking business primarily throughout the southern portion of the United States. (R. 6, 36, 166). E & L Transport Company (herein called "E & L"), not a party hereto, is a Michigan corporation having offices at Louisville, Kentucky, and operating a trucking business there and in other parts of the United States. (R. 7, 166).

Respondents here, plaintiffs-appellants below, as a class, are employees of Dealers and members of Local 89. (R.5).

Local 89 has been certified by the National Labor Relations Board to represent the employees of both Dealers and E & L and other companies, all of whom are members of a multi-employer bargaining unit. Identical contracts between the employers and the unions are negotiated and concluded on behalf of the unions by the National Conference, and on behalf of the employers by the Automobile Transporters Labor Division. (R. 19, 252-253, 263). The current agreement, known as the "Automobile Carrier Truckaway Agreement," covers the period of March 1, 1961 through February 29, 1964. Both Dealers and E & L are signatories to the Agreement. (R. 19, 263).

The said Agreement provides, in Article 1, Section 1, that the employer will recognize the National Conference, on behalf of its member locals, as the exclusive representative of all employees. (R. 19, K. 3).[1] Article 4, which involves seniority rights of employees, provides: "Any controversy over the employees' standing on such lists shall be sub-

[1] The designation "R. 19" refers to the record page to which the contract is attached. "K. 3" refers to the page in the contract where the provision cited appears.

mitted to the joint grievance procedure (ARTICLE 7)." (R. 19, K. 11). Section 5 of Article 4 states as follows:

> In the event that the Employer absorbs the business of another private, contract or common carrier, or is a party to a merger of lines, the seniority of the employees absorbed or affected thereby shall be determined by mutual agreement between the Employer and the Unions involved. Any controversy with respect to such matter shall be submitted to the joint grievance procedure. (ARTICLE 7). (R. 19, K. 14).

Article 6 establishes a Local Joint Committee and a Joint Conference Committee, each composed of both union and employer representatives, for the purpose of settling disputes. (R. 19, K. 19-20). Article 7 provides that neither the union nor the employer may resort to strike, lock-out or other self-help devices "without first using all possible means of a settlement, as provided for in this Agreement, of any controversy which might arise." (R. 19, K. 20). The grievance procedure calls for the following steps: initial settlement between the employer and union, followed by submission to the Local Joint Committee, appeal to the Joint Conference Committee and, finally, submission to an impartial board of arbitration. A decision at any step is to be final and binding upon the parties. It is further agreed that all matters of interpretation of the Agreement must be submitted for decision to the Joint Conference Committee. (R. 19, K. 21-23).

The principal business of both Dealers and E & L in Louisville was carrying automobiles for the Ford Motor Company. In 1961, due mainly to increased "piggy-back" activity by the railroads, Ford informed these companies that only one of them was needed to carry on the operation. Accordingly, Dealers and E & L agreed that Dealers would purchase E & L's "secondary authority" in the South, and E & L in turn would purchase Dealers' "initial authority" out of Lorraine, Ohio along with certain physical assets there. Thus, each company would consolidate its operations

geographically. To accomplish these objectives, the companies filed applications with the ICC, which applications are now pending. (R. 162-173).

When in August, 1961, the E & L employees at Louisville heard of this agreement, they filed a grievance with Local 89, claiming that pursuant to Article 4, Section 5 of the collective bargaining agreement, *supra*, they were entitled to be employed by Dealers, upon the consummation of the acquisition, while retaining the seniority they had enjoyed at E & L. They therefore contended that upon the absorption by Dealers of E & L's secondary authority at Louisville the seniority boards of the two companies should be merged. This process, whereby the seniority of separate groups of employees is merged on a single list, is commonly known as "dovetailing" of seniority. (R. 7, 240, 269). Local 89 carried the grievance to the Local Joint Committee where the matter was "deadlocked" by unanimous vote for submission to the Joint Conference Committee. (R. 186, 213, 240-243, 269-271). During the pendency of this grievance, and before learning all the facts surrounding it, Leslie Atterbury, Local 89's business agent, had told Dealers employees that the E & L employees would not succeed and that they had nothing to worry about. Apparently, until the Dealers employees got to Detroit before the Joint Conference Committee, they thought that Local 89 favored them in this dispute. (R. 115, 132, 210).

On October 18, 1961, the grievance was heard by the Joint Conference Committee in Detroit. Paul Priddy, Local 89's president and a member of this Committee, withdrew from the panel and did not participate in the decision because he wished to present his point of view to the Committee and because the grievance had arisen in his jurisdiction. Mr. Priddy presented the facts to the Committee and recommended that the seniority lists be dovetailed, since he felt that such action would in the long-run aid the larger part of the working force, including the Dealers employees who stood to be hurt at present. He pointed out that if the

seniority is not dovetailed, the E & L employees—most of whom had greater seniority than the Dealers employees—would go to the bottom of the list at Dealers thus losing credit for many years of service within the bargaining unit. (R. 220, 229-230, 270-271, 273-274, 282-284). According to Priddy, he entertained no prejudice against either Dealers employees or E & L employees, both of whom he represented. (R. 267-268). Mr. Snipes,[2] a Dealers official, also made a statement to the Committee, outlining the details of the Dealers—E & L agreement. (R. 170). The Dealers faction was represented at the hearing by three union shop stewards, who had been elected to that post by the Dealers employees. These three, although bitterly disappointed at Mr. Priddy's stand, spoke up for their cause. Their expenses for the trip were paid by the union. (R. 114, 121-122, 129-131, 143-144, 149, 230, 262). At that time, they raised no objections as to inadequate representation. (R. 143-144).

Thereafter, the Joint Conference Committee issued a unanimous decision, ordering the merger of seniority boards of Dealers and E & L within thirty days. (R. 322). Following the decision, and during the trial below, Dealers began to comply with the award while E & L continued to operate in Louisville with 25 to 30 men—pending decision on their applications to the ICC. It was assumed that, pursuant to the Committee award, E & L would employ the Dealers employees at Lorraine, Ohio, on the same seniority arrangement. (R. 140, 164, 171, 173, 246, 168).

B. Proceedings Below

C. W. Moore, an employee of Dealers, instituted a class suit for himself and about 300 other employees similarly situated against Local 89, the International Brotherhood of Teamsters, and Dealers in the Jefferson Circuit Court, Chancery Branch, First Division in Kentucky. Count I of the complaint alleged that plaintiffs had relied on the union

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[2] "Snipes" is referred to as "Snites" in the Record.

to present their case through the grievance process; that the union had deceived them and failed to represent them; that the decision of the Joint Conference Committee was "contrived" by the union; that the said decision was arbitrary and capricious and in violation of the collective bargaining agreement; and that plaintiffs, having lesser overall seniority than E & L employees, were being deprived of their jobs by the decision. Accordingly, Count I sought to enjoin enforcement of the Committee's ruling by Dealers and the Union. Count II repeated the above and, as an alternative to injunction, sought damages in the amount of $6,625,000. (R. 5-33).

Upon issue being joined on the pleadings, plaintiffs moved for a temporary injunction. (R. 39). Thereafter, by direction of the court, plaintiffs filed an amended complaint adding as defendants several E & L employees, representing that faction. (R. 43). The defendant International moved to quash the summons and dismiss the complaint as to itself. (R. 52). Your petitioner, defendant Local 89, moved to dismiss for failure to state a cause of action. On these motions, and later on the merits of the case, several hearings were held and testimony taken during the months of November and December, 1961, before Judge Macauley L. Smith. At the start of the hearings, counsel for defendant unions questioned the jurisdiction of the court on the ground that jurisdiction lay exclusively in the NLRB. (R. 107-108). On November 24, the judge issued an order granting the motion of the International to quash summons, and denying plaintiffs' motion for an injunction. In its accompanying opinion, the court upheld the ruling of the Joint Conference Committee, refusing to find that the Dealers employees had been inadequately represented at the hearing and that the award contravened the contract. (R. 55-57, App. B).

Plaintiffs appealed this decision to the Kentucky Court of Appeals. (R. 61). On November 29, that court sustained the appeal and ordered the issuance of a temporary injunction against enforcement of the award. (R. 63). There-

after, pending consideration of the merits by the trial court, defendant E & L employees moved to dismiss for failure to state a cause of action. (R. 68). Defendant Local 89 moved to dismiss on the ground of NLRB preemption of jurisdiction. (R. 69). On December 4, 1961, the trial court entered its judgment dismissing the complaint, and denying plaintiffs' motion for permanent injunction, on the same grounds previously stated by it. (R. 70, App. B). Plaintiffs again appealed to the Court of Appeals, moving that court to advance the case and to hear oral argument. (R. 72, 77). The court granted the motion to advance but overruled the request for oral argument, and on December 15 the case was ordered submitted on the record and briefs. (R. 78, 79).

Citing and quoting from appropriate decisions of this Court, petitioner in its brief to the trial court and the court below argued the limited scope of judicial review as to questions of arbitrability of grievances and validity of arbitration awards, noted that federal agencies and courts have consistently approved the contractual dovetailing of seniority and upheld the union's authority in such matters, pointed to the necessary applicability of federal law, contended that individual employees do not have a cause of action for breach of collective bargaining agreements, and reiterated the argument that NLRB jurisdiction is exclusive in the premises. (Br. 16-23).[2]

On December 15, the same day it ordered the case submitted on briefs, the Court of Appeals reversed the decision of the trial court, and made permanent its previously issued temporary injunction, noting that an opinion would be rendered later. (R. 80, App. A.). Local 89 made a motion to set aside the above order and submitted a memorandum on the question of jurisdiction, which was answered by plaintiffs. (R. 81, 82).

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[2] The designation "Br. 16-23" refers to the original brief filed by petitioner in the courts below, which appears in a volume of the Record separately certified by the court below and headed "Original Briefs".

On February 13, 1962, the Court of Appeals rendered an opinion wherein it appears that its order was based on the grounds that the Committee's interpretation of the collective bargaining agreement was erroneous, that the Dealers and E. & L contracts were independent of one another and the latter's employees could have no rights under the former's contract, that the union did not adequately represent Dealers employees and that, for all these reasons, the grievance was not arbitrable and the award was "arbitrary and violative of natural justice." The court also rejected the preemption argument, based on the exclusive jurisdiction of the NLRB.[4] Two judges dissented without opinion. (R. 84-94, App. A). An order was entered in accordance with the opinion. (R. 83, 94, App. A). Local 89 filed a timely petition for rehearing on March 16, 1962. (R. 96). In said petition, Local 89 argued that the court's opinion was inconsistent with this Court's decisions restricting the scope of judicial review in matters of arbitration, that the court should have applied federal law, that its decision had the effect of destroying the multi-employer bargaining unit protected by federal law, and that the court's jurisdiction was federally preempted. (R. 97, Pet. 6-17). On May 4, 1962, the petition was denied and the court's opinion was modified, but in no material respect. (R. 98, App. A). Thereafter, petitioner filed in this Court a timely application for extension of time, which application was granted by the Order of Associate Justice Potter Stewart, dated July 17, 1962, extending the time for the filing of this Petition to and including September 4, 1962.

REASONS FOR GRANTING THE WRIT

I

The instant case presents several issues of special interest and importance in the administration of the National

[4] It did, however, uphold the dismissal of the complaint as to the International Brotherhood of Teamsters because of its insufficient "connection with the controversy."

Labor Relations Act. Preliminarily, the case involves a question of the jurisdiction of a state court to adjudicate issues of alleged improper representation of employees in an arbitration proceeding by the union certified as their bargaining representative under the National Labor Relations Act, resulting in alleged job discrimination against such employees. In the instant case, the state court assumed such jurisdiction although the National Labor Relations Board has on various occasions afforded remedies for this same type of conduct under both Sections 8 and 9 of the Act. Next, even if it had jurisdiction, the court below erred in failing to recognize that this case is within the purview of, and of a kind covered by, the Labor Management Relations Act, particularly Section 301 thereof, therefore requiring the application of federal, not state, law. Moreover, the case presents the issue of whether individual employees may maintain suits of a kind covered by Section 301 in the state courts although precluded by that Section from doing so in the federal courts. This federal question, of substantial importance to the national labor policy and federal-state relations, has not heretofore been determined by this Court and should now be decided. Finally, as to each and every ground relied upon by the court below, its decision was inconsistent with governing federal law as enunciated by this Court.

As developed hereafter, the need for a proper administration of Section 301 of the Act, a continuing and consistent development of the national labor policy and a determination of the proper role of the state courts in enforcing federally created rights gives ample reason for the granting of this Writ.

II

In their complaint plaintiffs allege that they had trusted the "integrity and fairness" of the Union and had been disappointed in that trust; that the Union had misinformed them as to their representation at the arbitration hearing and, having deceived them, left them without representation; that the decision of the Committee was "contrived"

by the Union and was thus arbitrary and capricious and deprived them of their contractual rights; and that they had joined the Union for the purpose of being adequately represented but were not rendered such assistance as they were entitled to; and that by all of this they were discriminated against in their seniority and employment rights. Clearly the thrust of these allegations is that the Union had maliciously and capriciously failed to represent these employees and had discriminated against them. Since the exclusive source of a union's representational authority and obligations is Section 9 of the NLRA, the law governing the issue is that developed under that Section. *Ford Motor Co., v. Huffman*, 345 U.S. 330 (1953); *Aeronautical Industrial District Lodge 727 v. Campbell*, 337 U.S. 521 (1949).[4] Section 8 of the Act affords an even more obvious prohibition of the matters complained of in this case where, as here, the union's alleged improper representation results in alleged discrimination in respect to employment or seniority rights concerning which the Board has long provided remedies, increasingly so in the last several years. Since the alleged wrongful conduct of the union complained of in this case is arguably prohibited under the National Labor Relations Act, the National Labor Relations Board and not the state courts has exclusive jurisdiction to adjudicate the issues. *San Diego Bldg Trades Local 2020 v. Garmon*, 359 U.S. 236 (1959).

First, as to the jurisdiction of the Board to afford relief under Section 9 of the Act, the *Huffman* and *Campbell* cases, cited above, demonstrate that under Section 9 (a) of the Act each and every bargaining representative is obligated to represent all members of a unit fairly, nondiscriminatorily and in good faith. Enforcing this policy, the National Labor Relations Board has undertaken the task of policing the conduct of bargaining representatives by withholding or revoking certifications of unions that

[4] The complaint in both of the cited cases closely paralleled the one in the instant case, except that the former also stated a cause of action under the Selective Service Act of 1940.

discriminate hostilely against any segment of the bargaining unit, under the discretionary authority vested in the Board by Section 9. *Larus & Bro. Co.*, 62 NLRB 1075; *Hughes Tool Co.*, 104 NLRB 318; *Pittsburgh Plate Glass Co.*, 111 NLRB 1210; *A. O. Smith Corp.*, 119 NLRB 621. Thus, in *Larus & Bro.* the Board said:

> "We have conceived it to be our duty under the statute to see to it that any organization certified under Section 9 (c) as the bargaining representative acted as a genuine representative of all the employees in the bargaining unit."

And in *Hughes Tool Co.*, in language appropriate to the instant case, the Board stated:

> "Discrimination in the performance of the duties of the representative designed to deny equal treatment to those of the minority is to subvert the privilege and rights granted by the statute. . . . We believe it is also clear that the presentation and adjustment of grievances is an activity which is subject to this requirement of non-discriminatory representation by the certified union."

Second, it is clear that the union's conduct in this case, allegedly involving as it did discrimination in employment, is also a subject matter of remedy under Section 8 of the Act, particularly Sections 8 (a)(1) and 8 (a)(2) as against an employer involved in the discrimination and Sections 8 (b)(1)(A) and 8 (b)(2) as against the union so involved. In *Spielberg Mfg. Co.*, 112 NLRB 1080 and more recently in *Gateway Transportation Co.*, 137 NLRB No. 186 (decided July 1, 1962), involving the identical arbitration procedure as in the instant case, the Board took jurisdiction to remedy alleged discrimination in employment resulting from improper and discriminatory application of the union's grievance and arbitration procedure. More recently, on August 20, 1962, the General Counsel of the National Labor Relations Board issued a complaint charging a union with racial discrimination in refusing to proc-

ess a Negro employee's grievance. *Hughes Tool Co.*, 23-CA-1432.

The Board and the General Counsel having taken action in respect to complaints of the same nature as that made against the union here, it must be concluded that the subject matter is within the exclusive competence of the Board and that the state courts are without jurisdiction. This Court has already consented to review an analogous issue in *Smith v. Evening News*, cert. granted 7 L ed 2d 793 (1962) (No. 89, 1961 Term). The *Evening News* case, like the present one, involves a question of whether the state court has jurisdiction over a suit for damages for breach of a collective bargaining agreement where the action complained of also constituted an unfair labor practice in violation of the National Labor Relations Act. The issue here then would seem to be of equal importance, particularly where in addition it involves an application of Section 301 and the rejection of decisions of this Court which have established a national labor policy contrary to the pronouncements of the court below.

III

Even if it be assumed that the Labor Board and the state courts might have concurrent jurisdiction in the instant case, it nevertheless is incumbent upon the state court to apply federal labor law, and its failure to do so in a 301 type suit constitutes an additional compelling reason for the granting of this writ.

Section 301 is concerned with the enforceability of agreements between labor organizations and employers or between labor organizations themselves. The instant case involves that very subject matter. Thus, the complaint initiating these proceedings sought to enjoin the enforcement of the award of a grievance committee, rendered pursuant to a collective bargaining agreement and based on an interpretation thereof, on the ground (among others) that the decision was arbitrary, in violation of that agreement, and deprived respondents of their rights thereunder. Dur-

ing trial below, respondents' counsel stated: "Our only issue is whether or not their decision is in violation of this contract." (R. 268-269). Moreover, the court below, in rejecting petitioner's argument that the subject matter of the suit was preempted by the National Labor Relations Act, pointed to Section 301 as supporting the view that "the enforcement of a contract is not within the ken of the NLRB merely because it involves a labor problem." It designated the case as "simply an action to construe and enforce a contract." Accordingly, the case must be viewed as one within the purview of Section 301 and therefore governed by federal law. *Atkinson* v. *Sinclair Refining Co.*, 8 L ed 2d 462 (1962); *Local 174, Teamsters* v. *Lucas Flour Co.*, 7 L ed 2d 593 (1962).

Furthermore, the fact that the case was brought by individual employees, who under federal court decisions[4] could not have maintained such a suit in the federal courts, neither takes the case out of the purview of Section 301 nor dispenses with the requirement that federal law be applied. For the requirement of *Lucas Flour* that federal law be applied by the state courts in cases of a kind covered by Section 301 is based not on the precise jurisdictional boundaries of Section 301 but on the overriding need for uniformity, dictated by the national labor policy, in terms of the negotiation, administration and interpretation of collective bargaining agreements. *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 (1957). A contrary holding would require parties to so formulate their agreements as to satisfy two conflicting systems of law, the very requirement that Congress and this Court saw fit to avoid. The large number of suits brought by individuals on the basis

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[4] *Schatte* v. *Stage Employees & Moving Picture Machine Operators*, 84 F.Supp. 669 (S.D. Calif. 1949), aff. 182 F2d 158, cert. den. 340 U.S. 827; *Holman* v. *Industrial Stamping & Mfg. Co.*, 142 F.Supp. 215 (E.D. Mich. 1956); *Evening Star Newspaper Co.* v. *Columbia Typographical Union*, 141 F.Supp. 374 (D.D.C. 1954), aff. 233 F2d 697 (D.C. Cir. 1956); *Allen* v. *Teamsters, Local 820*, 185 F.Supp. 492 (D.C.N.J. 1960); *Copra* v. *Suro*, 236 F2d 107 (1st Cir. 1956).

of violations of collective bargaining contracts demonstrates that the area of potential conflict is indeed enormous. For such suits will obviously affect the law of collective bargaining to the same extent as suits brought by the parties themselves, and in so doing, will "strike at the very core of federal labor policy". (*Lucas Flour, supra,* 7 L ed 2d at 600). For that reason, we assume, this Court in *Lucas Flour* called for the application of federal law "in suits *of a kind* covered by Section 301" and "*in the areas* covered by the statute" (7 L ed 2d 598, 599), rather than "in suits over which federal courts may assume jurisdiction under Section 301."

Thus, the failure of the court below to apply federal law contravenes the clear mandate of the foregoing decisions and the intent of Congress, and frustrates the continuing attempt of this Court to provide labor and management with a cohesive body of law to govern their relations.

IV

As previously noted, the federal courts have uniformly held that individual employees may not maintain suits under Section 301 in the federal courts, since Congress has made it plain that Section 301 was to cover solely suits between a union and an employer or between unions themselves.[7] The question is therefore raised whether the national labor policy, including Section 301 itself, forbids individual employees from maintaining similar suits of a kind covered by Section 301 *in the state courts.* We submit that it does.

This Court has consistently held that where state courts have been called upon to enforce federally created rights they could not apply state laws, whether "procedural" or "substantive", that were incompatible with the policy underlying the federal statute. *McAllister* v. *Magnolia Petroleum Co.*, 357 U.S. 221 (1958); *Dice* v. *Akron, Canton & Youngstown R.R.*, 342 U.S. 359 (1952); *Brown* v. *Gerdes*, 321 U.S.

[7] See cases cited, *supra*, fn. 6.

178 (1944); *Garner* v. *Teamsters*, 346 U.S. 485 (1953); cf., *Angel* v. *Bullington*, 330 U.S. 183 (1947). Particularly is this true where, as here, the federal rule of law that is inconsistent with that of the state is contained in the very statute that provides the federal substantive law to be applied in the case and is made an integral part thereof. Cf., *Atlantic Coast Line R.R.* v. *Burnette*, 239 U.S. 199 (1915); *Engel* v. *Davenport*, 271 U.S. 33 (1926).

Section 301 permits suits only "between an employer and a labor organization" or "between any such labor organizations". It further provides: "Any such labor organization may sue or be sued as an entity and *in behalf of the employees whom it represents* . . . ." It is thus made abundantly clear, by the statute itself, that employees' rights under collective bargaining agreements are to be enforced, not by them individually, but by their representative who is party to such agreements. That Section 301 is not merely jurisdictional but is the source of federal substantive law is by now axiomatic. *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 (1957). Viewed in this light, the Section not only narrows the jurisdiction of federal courts to cases between the actual parties to an agreement but states, as a matter of policy, that insofar as difficulties arise under such agreements they are to be settled by the parties through the grievance procedure chosen by them—thus affording the parties the opportunity to administer the contract without outside harassment. The state law of Kentucky, permitting individual employees to skirt and attack decisions arising out of the grievance procedure by maintaining suits for breach of these agreements, encroaches upon the foregoing policy and must, therefore, give way. The states must apply the federal law. *Atkinson* v. *Sinclair Refining Co.*, *supra*; *Local 174, Teamsters* v. *Lucas Flour Co.*, *supra*.

The decision below, permitting the individual employees to sue, presents other points of conflict with national labor policy. Thus, individual employee suits for breach of collective bargaining contracts are inconsistent with the long-standing federal policy that collective bargaining on behalf

of all the employees is the task and duty of the union alone and that any activity which is incompatible with this exclusive representation constitutes a violation of the National Labor Relations Act. *J. I. Case Co.* v. *NLRB*, 321 U.S. 332 (1944). Moreover, the threat of such suits would have an adverse effect upon the very process of negotiation between the union and the employer. A union could no longer feel flexible enough to negotiate agreements which, while advancing the overall interest of the bargaining unit, might in some incidental respect adversely affect some members of the unit. In addition, if individuals who are prevented from maintaining Section 301 suits in the federal courts are allowed to do so in state courts, they would be encouraged to shop for the favorable state forum.[8] And because it is unlikely that such state court suits could be removed to the federal courts (28 U.S.C. Section 1441) the state, rather than federal, courts would anomalously become the chief architects of the substantive law to be developed under the federal Act.

It would not do to contend that the adoption of the argument presented here would deprive state courts of "jurisdiction" previously enjoyed by them, an effect Section 301 was not to have had. For the foregoing would no more limit state "jurisdiction" than did this Court's decision in *Atkinson*, or *Lucas Flour*, or the *Steelworkers* cases, or, for that matter, *Lincoln Mills* itself.[9] Nor can it be argued that the result contended for would leave individual em-

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[8] Some states permit individuals to sue for breach of a collective bargaining agreement while others forbid it. See *Falsetti* v. *Local 2026, United Mineworkers*, 46 LRRM 2389 (Pa. S. Ct. 1960) and cases cited in fn. 20.

[9] It should be noted that the instant issue is similar to another that has recently caused this Court some concern—whether the Norris-LaGuardia Act, prohibiting federal courts from enjoining strikes in breach of contract in cases under Section 301, similarly restricts the state courts. *Charles Dowd Box Co.* v. *Courtney*, 7 L ed 2d 483 at 491, fn. 8 (1962); *Sinclair Refining Co.* v. *Atkinson*, 8 L ed 2d 440 (1962) (dissenting opinion).

ployees without remedy. For they remain free to maintain suits against their representative where the latter hostilely discriminates against them or wrongfully deprives them of their internal union rights. *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953); *Larus & Bro.*, 62 NLRB 1075; *Gonzales* v. *Machinists*, 356 U.S. 617 (1958). They may also maintain suits to protect their "uniquely personal" rights of employment arising from their separate hiring contracts, as distinguished from rights that are fundamental to the collective bargaining agreement and affect the entire bargaining unit, as in this case. *Association of Westinghouse Salaried Employees* v. *Westinghouse Elec. Corp.*, 348 U.S. 437 (1955). Moreover, they would continue to receive the full protection of the National Labor Relations Act and the Labor Management Reporting and Disclosure Act of 1959.

For these reasons, the issue presented here, which is of substantial importance in terms of the administration of the Act and federal-state relations and which has not as yet been determined by this Court, commends itself to review at this time.

V

Petitioner further submits that, as to each and every ground relied on by the state court for setting aside the award of the Joint Conference Committee, the decision below was clearly inconsistent with the national labor policy as established by decisions of this Court:

1. The holding of the state court was primarily based upon its view that Article 4, Section 5 of the collective bargaining agreement had no application to the grievance submitted by the E & L employees, that in any event the interpretation of that provision by the Joint Conference Committee was wrong, and that the said provision could not extend to employees other than those employed by Dealers. In short, the court undertook to interpret the contract *de novo* and found itself in disagreement with the interpreta-

tion of the Joint Conference Committee, finding the latter to have been "erroneous." On that basis, the court held that the grievance was not arbitrable and that the award was arbitrary.

In so doing, the court failed to adhere to the many decisions of this Court establishing the standards of review to be exercised by the courts in cases involving the enforcement of grievance provisions of collective agreements. *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *United Steelworkers* v. *Enterprise Corp.*, 363 U.S. 593 (1960). These cases, now landmarks in the Section 301 area of labor law, direct the courts to avoid deciding grievances on their merits, thus promoting the settlement of labor disputes through means chosen by the parties to collective bargaining agreements. Thus, they direct the courts to uphold the arbitrability of a grievance so long as the claim "on its face is governed by the contract" (363 U.S. at 568), or "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute". (363 U.S. at 582-583). Moreover, these cases stand for the proposition that once an award has been rendered by an arbitrator "the courts have no business overruling him because their interpretation of the contract is different from his." (363 U.S. at 599).

Yet, in the instant case, the state court found that the dispute was not arbitrable in the face of a contract provision calling for the submission to the grievance procedure of "any controversy." Further, it undertook to interpret both the substance and scope of the contract on its own, and set the award aside precisely because its interpretation of the contract was different from that of the Committee chosen by the parties to settle their disputes. This manifest inconsistency with decisions of this Court should not be permitted to stand.

2. Moreover, in deciding that Article IV, Section 5 of the

Dealers contract could not cover the E & L employees because the Union had signed a separate contract with each employer, the court not only placed an interpretation upon that provision that is contrary to its plain meaning and the interpretation of the parties themselves but failed to grasp the significance of multi-employer bargaining units. The purpose of bargaining on that basis is not only to permit equalization of power between labor and management, but to assure that all employees within a certain area or industry work under the same rates, working conditions, rights and obligations so as to minimize threats to peaceful relations in the area or industry involved. The validity of such bargaining units has been expressly recognized and protected by decisions of both this Court and the National Labor Relations Board. *NLRB* v. *Truck Drivers Local 449* (*Buffalo Linen Supply Co.*), 353 U.S. 87 (1957); *Retail Associates, Inc.*, 120 NLRB 388; *Balaban & Katz*, 87 NLRB 1071. By contrast, the narrow and technical view of the court below that parties within such a unit must be deemed to have entered into "separate" contracts has the effect of fragmentizing the multi-employer bargaining unit in contravention of the national labor policy. A similar attempt to break up or weaken the effectiveness of the over-all unit, when undertaken by private parties, would not receive the protection of the Act and would justify counterveiling defensive measures by members of the unit. *Buffalo Linen Supply Co., supra.*

3. Finally, the court below expressed the view that the "erroneous" decision of the Committee must be viewed against a background of what the court believed was inadequate and deceitful representation of the Dealers employees on the part of the Union, which tainted the award and violated "natural justice." Thus, the court emphasized as one of the bases of its decision that the Union had represented two antagonistic interests, and had pursued a "spurious grievance" and that it did so because its own "power and influence . . . stood to be enhanced" by the award of the Committee. But in making these findings, the

court did not follow, or even advert to, the law developed under Section 9 of the Labor Management Relations Act by decisions of this Court, which law alone governs the extent of a union's authority and rights as a representative. *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953); *Aeronautical Industrial Dist. Lodge 727* v. *Campbell*, 337 U.S. 521 (1949); cf., *Steele* v. *Louisville and Nashville R.R.*, 323 U.S. 192 (1944); *Tunstall* v. *Brotherhood of Locomotive F & E*, 323 U.S. 41 (1957); *Conley* v. *Gibson*, 355 U.S. 41 (1957). Thus, the standard promulgated by these cases to test a union's representational efforts under the Act is whether the union's conduct was motivated by "hostile discrimination" or, rather, by an honest desire to protect the interests of all the employees it represents. Yet the complaint did not allege hostile discrimination, the record herein would not support such a finding and the court did not so find.

It is evident, moreover, that the law as developed by this Court would require a result different than that reached by the state court. Underlying much of that court's opinion was its obvious dislike of any contractual action that deprives a minority of employees of certain rights, particularly when accomplished by means of dovetailing seniority. While this protective attitude of the court is understandable, it fails to take into account one of the facts of life of collective bargaining, namely that a union must often represent antagonistic interests within a bargaining unit. Especially is this so where, as here, a merger is effected which seriously jeopardizes the seniority of a substantial number of employees represented by the union. While, in such cases, the union is often blamed by the adversely affected group for having caused its injury, the union is merely performing the unwelcome task of deciding which of two employee groups should suffer as a result of employer changes in operation over which the union has no control.[10]

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[10] It is not at all unlikely that if, in the instant case, the Joint Committee's decision had favored the Dealer's employees, the E & L employees would have brought a similar suit.

And in these circumstances, so long as no hostile discrimination is shown, a union may properly advance the interest of one group to the disadvantage of another. In *Ford* v. *Huffman* this Court expressed that view in the following terms:

> Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected.
>
> . . . . . .
>
> Any authority to negotiate derives its principal strength from a delegation to the negotiators of a discretion to make such concessions and accept such advantages as, in the light of all relevant considerations, they believe will best serve the interests of the parties represented. (345 U.S. at 337-338).

Moreover, in both the *Ford* v. *Huffman* and *Campbell* cases, this Court upheld similar contractual adjustments of seniority rights—always at the expense of a certain group of employees—over contentions that such contracts were "arbitrary" and that the bargaining representative exceeded its authority by so contracting. See also *Hardcastle* v. *Western Greyhound Lines*, 303 F2d 182 (9th Cir. 1962); *NLRB* v. *Wheland Co.*, 271 F2d 122 (6th Cir. 1959). The federal courts have similarly sanctioned decisions of the ICC,[11] the CAB[12] and bipartisan adjustment boards under the Railway Labor Act[13] to dovetail the seniority of employees affected by mergers and other contractual adjustments of their employment status.

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[11] *U.S.* v. *Lowden*, 308 U.S. 225 (1939); *Railroad Labor Executive Ass'n* v. *U.S.*, 339 U.S. 142 (1950).

[12] *Kent* v. *CAB*, 204 F2d 263 (2d Cir. 1953).

[13] *Starke* v. *N.Y., Chicago & St. Louis R.R.*, 180 F2d 569 (7th Cir. 1950); *Fagan* v. *Pa. R.R.*, 173 F.Supp. 465 (M.D. Pa. 1959).

Finally, the reliance of the court below upon its own view of "natural justice" is obviously misplaced. The comprehensive panoply of federal statutes governing labor relations leaves no room whatever for such subjective and loosely defined concepts. The validity of the union's conduct, as it affected the grievance decision, should have been tested exclusively by the standards established by this Court in the line of decisions headed by *Ford* v. *Huffman*.

CONCLUSION

It is respectfully submitted that, for the reasons asserted above, this Petition for a Writ of Certiorari should be granted.

DAVID PREVIANT,
511 Warner Building
Milwaukee 3, Wisconsin

HERBERT S. THATCHER,
DAVID S. BARR,
1009 Tower Building
Washington 5, D.C.

RALPH H. LOGAN,
506 West Jefferson Street
Louisville 2, Kentucky
Counsel for Petitioner

APPENDIX A

ORDERS—KENTUCKY COURT OF APPEALS

FALL TERM, DECEMBER 1, 1961

JEFFERSON CIRCUIT COURT

C. W. MOORE, Individually and for and on behalf of members of the Class, *Plaintiffs*

Vs: No.....

LOCAL UNION No. 89, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFERS, WAREHOUSEMEN AND HELPERS OF AMERICA, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFERS, WAREHOUSEMEN AND HELPERS OF AMERICA AND DEALERS TRANSPORT COMPANY, *Defendants*

TEMPORARY INJUNCTION

The above styled cause coming on to be heard this 29th day of November, 1961, on appeal to the Court of Appeals of Kentucky from an order of the Jefferson Circuit Court denying the temporary injunction to the plaintiff herein and the Court having considered the record and heard the argument of counsel herein and being advised;

It is hereby ORDERED AND ADJUDGED that the defendants, Local Union No. 89, General Drivers, Warehousemen, Helpers and Dealers Transport Company, and each of them, be and they are now and hereby enjoined from putting into effect or enforcing the decision of the Automobile Transporters Joint Conference Committee, which reads as follows:

"LOCAL UNION NO. 89 (LOUISVILLE) VS. DEALERS TRANSPORT CO., AND E & L TRANSPORT COMPANY OF KENTUCKY.

Re: Request of Employees R. L. Lewis and Howard Baker on behalf of themselves and other former employees of E & L Transport Co. of Ky. as to their seniority

rights with Dealers Transport Co., because of the discontinuance of operations in Louisville by E & L Transport Co. of Ky.

DECISION: By unanimous vote the Committee held that in accordance with Article 4 and particularly sub-section 4 and 5 of the Automobile Carrier Truckaway Agreement, Automobile Carrier Driveaway Agreement and the Automobile Carrier City Delivery, Pull-Out, Mounting Service and Yard Agreement and Garage Rider, the employees of E & L Transport Co. of Ky. and Dealers Transport Company at the Louisville, Kentucky Terminal shall be sandwiched in on master seniority boards using the presently constituted seniority lists and the dates contained therein at Louisville, Kentucky (past practice on layoffs and recalls shall be maintained as in the past).

1. Presently constituted terminal seniority lists shall apply for seniority purposes recognizing that the first fifty (50) men who came from Memphis, Tennessee to Louisville, Kentucky, maintained their original date of hire and took their proper place on the Louisville seniority boards of Dealers Transport Co. Men subsequently who came to Louisville from Memphis went to the bottom of the board at Dealers Transport Company and maintained their seniority for fringe benefits only.

2. This shall be accomplished within thirty (30) days. Copies of this de-

cision shall be posted on the bulletin boards at both companies.

And further that said temporary injunction shall be effective from this date until further orders of this court, on condition only that the plaintiff file a bond, with surety, in the amount of $50,000 with this court to pay such damages to the defendants, if any, as the said defendants may sustain by reason of this temporary injunction, if the court shall eventually decide that the plaintiff herein was not entitled to this temporary injunction.

It is further ORDERED and ADJUDGED that any action taken by the defendants herein to enforce the above set out decision shall be revoked and any employees who are members of the class of plaintiffs herein, who have lost their jobs by reason of said decision, shall be reinstated to their jobs pending further orders of the court.

November 29, 1961

/s/ ROBERT B. BIRD,
Judge

ORDERS—KENTUCKY COURT OF APPEALS

Fall Term, December 15, 1961

COURT OF APPEALS OF KENTUCKY

C. W. MOORE, INDIVIDUALLY AND FOR
AND ON BEHALF OF MEMBERS OF THE CLASS, *Appellants*

VS:

LOCAL UNION NO. 89, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, CHAUFFERS,
WAREHOUSEMEN AND HELPERS OF AMERICA,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFERS, WAREHOUSEMEN AND HELPERS
OF AMERICA, AND DEALERS TRANSPORT COMPANY, *Appellees*

ORDER GRANTING PERMANENT INJUNCTION

This day this cause came on for hearing on appeal and the Court having reviewed and reversed the decision of the Jefferson Circuit Court herein, IT IS NOW ORDERED that the temporary injunction granted by this Court on the 29th day of November, 1961, be made permanent.

And, IT IS FURTHER ORDERED that the injunction bond, executed by the appellants in the sum of $50,000.00, be and it hereby ordered cancelled, set aside and held for naught.

The opinion herein will be written and rendered at a later date.

Entered this 15th day of December, 1961.

/s/ ROBERT B. BIRD,
Chief Justice

RENDERED: February 13, 1962
MODIFIED: May 4, 1962

COURT OF APPEALS OF KENTUCKY

C. W. Moore, *Appellant*

Vs:

Local Union No. 89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Et Al., *Appellees*

APPEAL FROM JEFFERSON CIRCUIT COURT
CHANCERY BRANCH—FIRST DIVISION
HON. MACAULEY L. SMITH, JUDGE

OPINION OF THE COURT BY JUDGE PALMORE

AFFIRMING IN PART
REVERSING IN PART

This injunction suit brought as a class action by a member of a labor union questions the right of the union and the plaintiff's employer, Dealers Transport Company, to carry out the terms of a decision relating to job seniority rights. The decision in question was reached through the grievance procedure set forth in a contract between the union and the employer. The chancellor upheld the decision and denied relief.

Dealers Transport Company, of Memphis, Tennessee, and E & L Transport Company, of Detroit, Michigan, were competitors in the transportation of new automobiles and trucks from the Louisville assembly plant of the Ford Motor Company. With the development of multi-level or "piggy-back" railroad shipments they began to lose business, and Ford advised both companies that eventually there would be room for only one of them. Following discussions over a period of 1½ to 2 years it was agreed between Dealers and E & L that E & L would withdraw, leaving the Louisville field to Dealers. This arrangement does not involve the sale or transfer of any equipment, facilities, or other property, but an application has been

made to the Interstate Commerce Commission for the transfer to Dealers of E & L's authority to make "secondary" runs out of Louisville. For this transfer Dealers is to pay a nominal consideration covering the expense of the transaction. There was and is no agreement between the companies calling for a transfer of any employees from one to the other.

Because of the increased competition from both rail and water shippers, Dealers and E & L decided also that it would be advisable for each of them to retrench by drawing its operations closer to home. So, at the same time the application was made for a transfer of E & L's secondary authority out of Louisville to Dealers, two other applications were submitted to the I.C.C., as follows:

(1) To authorize the sale and transfer to E & L of Dealers' initial authority out of Lorraine, Ohio, along with physical assets such as tractors, shop equipment, and terminal facilities there located.

(2) To authorize the sale and transfer to Dealers of E & L's secondary authority to serve New Orleans and Shreveport, Louisiana, and Jackson, Mississippi.

It was emphasized in the testimony that each of these proposed transfers is separate, none being contingent on either of the others. All are pending before the I.C.C.

Most if not all of the labor forces at both Dealers and E & L are members of Local No. 89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, which in turn is "affiliated" with two autonomous but apparently interlocking organizations, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and the National Truckaway and Driveway Conference. For convenience we shall refer to these three organizations as the Local Union, the International, and the National Conference.

The Teamsters Union, as it is commonly called, has represented the employees of E & L and its predecessor in

business for over 20 years and has represented the Dealers employees since 1955 or 1956. The National Conference, in behalf of its member local unions, is the exclusive representative of the employees for purposes of collective bargaining, and its standard contract for the period March 1, 1961, to February 29, 1964, printed in booklet form, has been separately executed by Dealers and by E & L. In each instance the agreement is signed by the Local, the National Conference, and the employer, but not by the International as such.

The standard contract secures job seniority rights to the employees. These rights are established, broadly speaking, on a terminal or local rather than a company-wide basis. For example, Article 4, Sec. 1 says: "Terminal seniority shall prevail at all times except as provided for in Article 4, Section 6, Subsection (b)2." The latter subsection provides that if a branch or terminal is closed or partially closed and its work transferred to another branch or terminal an employee transferring from one to the other shall go to the bottom of the seniority board for purposes of job selection but shall exercise his company seniority for lay-off purposes and all other contract benefits. When a new branch or terminal is opened a new seniority board is established, and an employee who transfers to it from another location loses his seniority rights at the old terminal at the end of 2 years. (In the case of Dealers, which established its Louisville terminal in 1955, there was a special exception under which the first 50 employees transferring from Memphis were permitted, for some reason not disclosed in the record, to carry with them the original seniority dates.)

The standard contract (Article 7, Section 2) further provides a grievance procedure under which "disputes" shall first be taken up between the employer and the local union involved. On their failure to agree the dispute is taken before a "Local Joint Committee" composed of both union and management representatives. If this committee cannot resolve the controversy it may be appealed to a body called

the Automobile Transporters Joint Conference Committee (hereinafter called the Detroit committee), which consists of both labor and industry-wide management representatives. When this panel is unable to agree the matter must be submitted to further arbitration.

Though E & L is still operating in Louisville, in August of 1961, when this controversy developed, a shift of business from E & L to Dealers obviously was taking place. As E & L began to drop its men employment at Dealers increased. Some of the E & L men were taken on by Dealers, but as the layoffs at E & L accelerated it was inevitable that there would be no room at Dealers for any more. Then it was that two of the former employees of E & L filed with the Local Union a grievance claiming that they and other displaced employees of E & L were entitled to employment by Dealers through a merger of the respective seniority list of the two companies.

Without taking the question up with Dealers (thereby omitting the first step in the grievance procedure), the Local Union submitted it to the Local Joint Committee, where at the recommendation of one of its members, Paul Priddy, president of the Local Union, it was "deadlocked," meaning that the Local Joint Committee decided to pass the problem to the Detroit committee for solution. The Dealers employees were disturbed at this turn of events, but their apprehensions were allayed by assurances from Mr. Priddy's assistant that they were protected by their terminal seniority rights and were not in any trouble. Three of these men attended the Detroit hearing, where they expected their interests to be represented and upheld by Mr. Priddy. But, like the innocent little oysters who took the famous walk with the walrus, they were mistaken, for, according to the testimony of Dealers' personnel manager, when Mr. Priddy had suggested to the Local Joint Committee that the grievance be "deadlocked" and sent to Detroit he remarked "That he knew Mr. Hoffa's thinking on matters of this nature and that these men were going to be sandwiched in." (Mr. Hoffa was president of the International,

chairman of the National Conference, and chairman of the Detroit committee.)

When the grievance was called on the docket of cases being heard before the Detroit committee, Mr. Priddy, who also was one of the members of that tribunal, vacated the bench, as was customary for the committee members to do when their own cases were involved. At this time he informed the three Dealers employees, to their surprise and consternation, that, he was going to take a stand in favor of merging the Dealers and E & L seniority boards. Representing the Local Unions, he thereupon proceeded to state the grievance to the Detroit committee and successfully recommend its solution on that basis. The decision of the Detroit committee, announced a few days after the hearing, was to the effect that the seniority registers of Dealers and E & L at Louisville were to be merged within 30 days.

E & L's Louisville terminal evidently is older than that of Dealers, which was established in 1955. This means that by and large the E & L employees will have greater seniority in the event the merger of seniority boards stands. For example, even with the right of the first 50 Dealers men who came from Memphis in 1955 to retain their original Memphis hire-in dates, out of the first 200 men listed on the new board only 58 will be Dealers Men. As a result, on November 25, 1961, just before this suit was filed, Dealers laid off 96 of its Louisville employees who were displaced by former employees of E & L.

The decision of the Detroit committee is being attacked in this case upon the grounds that it is so unjust as to imply fraud, or, to put it another way, that it is arbitrary and therefore subject to judicial inquiry and disposition. Specifically, the court is asked to enjoin the Local Union, the International (though it was not, as such, a party either to the contract or the grievance proceedings), and Dealers from carrying into effect the decision of the Detroit committee. Affected E & L employees were made defendants by amendment.

The question has been raised as to the amenability of International to process through service on the president of its affiliated Local Union. Since, however, International was not a party to the contract or the grievance proceeding we believe its connections with the controversy is insufficient to warrant any relief against it. Hence the judgment of dismissal as to International was correct and it is unnecessary to consider the jurisdictional point.

Appellant and his fellow-employees of Dealers rely heavily on one of the provisions of a special rider attached to the contract between Dealers and the Local Union. It reads as follows:

"The Louisville domiciled employees of the Employer shall have exclusive rights to all work originating at the Louisville Terminal."

This provision, or its progenitor, grew out of a controversy in Memphis in 1955, when the Memphis employees, during a slack period, sought to displace drivers of loads passing through Memphis from other points of origin. We agree with the chancellor that it is not dispositive of the problem that arose in this case. The real question was whether the E & L drivers are entitled to be employees of Dealers, and the Detroit committee ruled, in effect, that they were. If that is correct, then the rider provision had no more application to their employment that it would have to the hiring of a new employee from any other source.

The contract provision (Article 4, Section 5) on which the Detroit committee based its ruling to the effect that the E & L employees are entitled to employment by Dealers reads as follows:

"In the event that the Employer absorbs the business of another private, contract or common carrier, or is a party to a merger of lines, the seniority of the employees absorbed or affected thereby shall be determined by mutual agreement between the employer and the Unions involved. Any controversy with respect to such matter shall be submitted to the joint grievance procedure."

It is the theory of the E & L employees that the transfer to Dealers of E & L's secondary runs out of Louisville constitutes an absorption of business and that under this clause Dealers is required to absorb the affected employees as well as the business. We cannot find any such meaning in the clause. It deals only with seniority, and not with initial employment. Unless and until the absorbing company agrees to take the employees of the company whose business is being absorbed no seniority problem is created, hence this provision of the contract can have no application. It does not require that the absorbing company take these employees, but only that if it does take them the question of seniority between the old and new employees will be worked out by agreement or else be submitted to the grievance procedure.

It must be remembered that even though Dealers and E & L have signed practically identical contracts with the same union, still they are separate agreements. These two employers, their respective employees, and the union are not one big happy family living under the same tent. As we see it, the displaced E. & L. employees can have no greater right to employment by Dealers than they would possess if they belonged to a different union, or to no union at all. Note, for example, that the contractual provision just quoted mentions "the *Unions* involved." (Emphasis added.) Suppose that the E & L men were represented by a different union. Would they have any rights under this contract between Dealers and another collective bargaining agent? Surely not. Nor would it be possible for them to initiate a grievance directed toward a company with which they had never enjoyed as employer-employee relationship. They are strangers to the Dealers contract, and it was not made for their benefit.

Since Article 4, Section 5, had no application under the circumstances of this case we are of the opinion that the question was not arbitrable under the grievance procedure. Arbitrability is an issue of law, which may be determined judicially. See discussion in *Harbison-Walker Refrac. Co.*

v. United Brick & C. Wrks., Ky. 1960, 339 SW 2d 933. But even if it were otherwise, we find the decision of the Detroit committee to be so erroneous, and made under such circumstances, that it was arbitrary.

Before proceeding further let us clarify the position of Dealers, the employer, in this matter. It is neutral. Its relations with its employees have been highly satisfactory, and the year ending July 1, 1961, was its best year to date for efficiency as to accidents, cargo-damage, and the like. It has recognized all along that the real controversy here was within the union itself. It feels bound to honor the contract and the "decisions of all agents to the employees who legally work for us." At Detroit it took the position that it was up to the union to decide what to do with the employees. In its November 25 letters to the 96 displaced employees it specifically advised them that their dismissal was "necessary due to Union action whereby the decision was rendered" by the Detroit committee requiring absorption of the E & L seniority list. It seems clear that Dealers was scarcely a real party in interest to the grievance proceeding. The actual antagonists were the E & L men on the one hand and the Dealers men on the other, all union members.

Representing these two antagonistic interests was the same union. It is useless to say that the union did not "represent" anyone in the grievance proceeding. Common sense verifies the testimony in this case to the effect that the men looked to and depended on their union officials to espouse their rights. Otherwise, what legitimate business does a union have in such a proceeding. It would be equally unrealistic to hold that the Dealers employees had representation before the Detroit Committee through the presence of three of their number who made the trip with Mr. Priddy and his assistant. As one of them said, he was only a shop steward and was not prepared or qualified to make a presentation to the national grievance panel. So we have a situation in which two antagonistic interests were represented by the same advocate. This of itself is enough to

destroy the traditional presumption in favor of an arbitration award. Moreover, we cannot overlook the fact that even the advocate must have had an interest of its own, in that the power and influence of the union stood to be enhanced by a decision permitting the employment and seniority of its members to cut horizontally across company lines. Under these particular circumstances the solution of the controversy under the cloak of a spurious "grievance" against a virtually disinterested employer simply will not bear careful scrutiny, and when we view the erroneous decision of the Detroit committee against such a background we judge it as having been arbitrary and violative of natural justice. Any other conclusion would reduce these employees to the status of pawns instead of free men. So, even though it be considered that the Detroit ruling was made pursuant to Article 7, Section 2(d) of the contract, providing for arbitration of all questions of contract interpretation, it still cannot stand. This result is not in conflict but is consistent with the principles stated in *Smith v. Hillerick & Bradsby Co.*, Ky., 1952, 253 SW 2d 629.

The most difficult question in this case is whether the complaint of the suing employee is within the exclusive jurisdiction of the National Labor Relations Board.

Section 10(a) of the Taft-Hartley Act, 61 Stat. 146 (1947), 29 USCA § 160(a), empowers the NLRB "to prevent any person from engaging in an unfair labor practice . . . . . affecting commerce," subject to certain exceptions. Unfair labor practices are defined in Section 8 of the Act, 29 USCA § 158. An examination of the latter section convinces us that the controversy in this case does not involve an unfair labor practice. Section 8 (b) (2) makes it an unfair labor practice for a union "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3)." However, the latter subsection is confined to discrimination the purpose of which is "to discourage membership in any labor organization." Obviously, this is not such a case. Whatever may have been the end result of the actions of the union and the employer,

they were not motivated by any of the illicit objects and designs set forth in Section 8 of the Act as constituents of an unfair labor practice. As we see it, what we have here is not a labor dispute, but simply an action to construe and enforce a contract under which the complaining employee and his fellows have certain rights of tenure. By entertaining that action the courts of this state neither intend nor claim to exercise any jurisdiction in the field of national labor policy, which has been delegated by Congress exclusively to the NLRB. We find inferential support in that Congress has expressly authorized the federal courts to adjudicate suits for violation of labor contracts (29 USCA § 185), which means that the enforcement of a contract is not within the ken of the NLRB merely because it involves a labor problem.

We recognize that if an activity is "arguably" subject to the Act "the States as well as the federal court must defer to the exclusive competence" of the NLRB. *San Diego Unions v. Garmon*, 1959, 359 U.S. 236, 245, 79 S. Ct. 773, 3 L. Ed. 2d 775. However, we are not convinced that the question in this case is reasonably arguable.

Insofar as it dismissed the action against the International union the judgment is affirmed. Otherwise it is reversed with directions that a judgment be entered in accordance with this opinion.

Judges Moremen and Williams dissenting.

ORDERS—KENTUCKY COURT OF APPEALS

Winter Term, February 16, 1962

COURT OF APPEALS OF KENTUCKY

C. W. MOORE, Individually, and for and on behalf of members of the class, *Appellants*

Vs:

LOCAL UNION No. 89, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA AND DEALERS TRANSPORT COMPANY, *Appellees*

ORDER MODIFYING THE ORDER GRANTING A PERMANENT INJUNCTION UNDER DATE OF DECEMBER 15, 1962.

The Court having this day rendered its opinion affirming in part and reversing in part this appeal from the Jefferson Circuit Court, now orders and directs that the order granting a permanent injunction dated December 15, 1962, be modified to conform to the opinion of the Court this day delivered.

IT IS SO ORDERED.

Entered this 13th day of February, 1962.

/s/BRADY M. STEWART
Chief Justice.

ORDERS—KENTUCKY COURT OF APPEALS

Spring Term, May 4, 1962

MOORE, INDIV., ETC.,

VS.

LOCAL UNION No. 89, ETC.
et al. Jefferson

The Court being sufficiently advised, the opinion delivered herein is modified on its face, and it is considered that the appellees' petition for rehearing be and the same is hereby overruled.

APPENDIX B

CR 61535

JEFFERSON CIRCUIT COURT CHANCERY BRANCH FIRST DIVISION

C. W. Moore, Individually and for and on Behalf of Members of the Class, *Plaintiffs*

v.

Local Union No. 89, *et al.*, *Defendants*

ORDER

This action having been tried to the Court on November 18 and November 24 on plaintiffs' motions for a temporary injunction, and the Court having heard the arguments of counsel, and being advised,

IT IS ORDERED as follows:

1. That the motion to quash the service of summons on the defendant, "International Brotherhood of Teamsters, Chauffeurs, etc.," served November 18, 1961, by delivering a copy to Paul Priddy, President of Local Union No. 89, be and it is sustained.

2. That the plaintiffs' motion for a temporary injunction against the implementation of the decision or arbitration award of October 18, 1961, by the Automobile Transporters Joint Conference Committee in Detroit be and it is overruled.

NOVEMBER 24, 1961.

/s/Macauley L. Smith, *Judge*

MEMORANDUM OPINION

In this case, the employer, Dealers Transport Company, was engaged as a competitor of E & L Transport Company in the transportation of new cars and trucks from the Ford Motor Company, Louisville assembly plant. Some time in the Spring of 1961 Ford announced (probably because of

the increasing number of its vehicles being transported piggy back by rail carriers) that in the future it would deal only with one of the two. Negotiations followed between the two truckaway carriers, and they determined that, subject to ICC approval, Dealers Transport would take over E & L's routes out of Louisville and E & L would take over certain operations of Dealers in Ohio and out of Memphis.

A grievance by two employees of E & L, who anticipated losing their jobs, was filed with Local 89 which represented the (Louisville) employees of both employers. Without decision in Louisville, these grievances were forwarded to Detroit for hearing by the Automobile Transporters Joint Conference Committee. Plaintiffs complained that up until a few moments of the hearing in Detroit they were led to believe by the President of Local 89, Paul Priddy, and his chief agent (with respect to these two employers) Les Atterbury, that the position of Dealers Transport employees would be furthered by them before the Joint Conference Committee in Detroit; whereas, in fact, Priddy at the hearing made a statement favoring "sandwiching in" of the E & L employees into the Dealers Transport seniority list with the contemplated effect that a number of the latter will lose their seniority and may lose their jobs.

The Joint Conference Committee in Detroit is composed of equal representation of the representatives of labor and of industry, and no contention is made that the pertinent facts with respect to this proposed "merger" or "absorption" of routes were not truthfully disclosed to the Committee. While plaintiff and those whom he represents were disappointed in the action of their Local 89 representatives, there were three shop stewards from Dealers Transport attending the Detroit meeting, and it would be a matter of idle speculation to assume that the result would have been different had the matter been differently presented.

This Court conceives that the provisions of Article 4, Section 5, Page 14, in the printed Agreement effective March 1, 1961, governed this state of facts instead of

Article 4, Section 6, subsection 2 on page 17, of said printed Agreement. This Court cannot follow counsel for plaintiff's argument that the paragraph on page 2 of the four page rider to said contract, providing:—

> "The Louisville domiciled employees of the Employer shall have exclusive rights to all work originating at the Louisville Terminal."—

is determinative of the controversy. When the E & L employees become employees of Dealers Transport, they will be Louisville domiciled employees of the employer, and this Court believes their rights are governed by Article 4, Section 5, mentioned above, and that a binding determination of the controversy was made in Detroit on October 18, 1961.

NOVEMBER 24, 1961

/s/MACAULEY L. SMITH, *Judge*

C.2 61535

JEFFERSON CIRCUIT COURT CHANCERY BRANCH FIRST DIVISION

C. W. MOORE, *Plaintiff*

v.

LOCAL UNION No. 89, *et al.*, *Defendants*

JUDGMENT

The parties by counsel having agreed that the within action might be submitted in chief to the Trial Court on the proof introduced herein November 18 and 24, 1961, on motion for temporary injunction together with brief additional testimony of Mr. Stoval heard this day, and the Court having considered all of said evidence, for the reasons stated in Memorandum Opinion filed herein on November 24, 1961,

IT IS ORDERED AND ADJUDGED as follows:

1. That plaintiff's motion for a permanent injunction against the implementation of the decision of the Automobile Transporters Joint Conference Committee in Detroit on October 18, 1961, be and it is overruled.

2. That plaintiff's complaint as amended be and it is dismissed.

3. That defendants recover of plaintiff their costs herein expended.

4. That the order of temporary injunction signed herein on November 29, 1961, by Chief Justice Bird be and it is continued in effect pending the contemplated appeal herein.

DECEMBER 4, 1961

/s/ MACAULEY L. SMITH, *Judge*

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1962

No. 17

WALTER HUMPHREY, Etc., Et Al., - Petitioners,

versus

C. W. MOORE, Etc., Et Al.,
GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION No. 89, and
DEALERS TRANSPORT COMPANY, - Respondents.

AND

No. 18

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION No. 89, - Petitioner,

versus

C. W. MOORE, Et Al., - - - - Respondents.

RESPONSE.

BROWN, SLEDD & McCANN,
JOHN Y. BROWN,
601 Security Trust Bldg.,
Lexington, Kentucky,
Counsel for Respondents.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1962

No. 407

WALTER HUMPHREY, Etc., Et Al., - *Petitioners.*

v.

C. W. MOORE, Etc., Et Al.,
GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION No. 89, and
DEALERS TRANSPORT COMPANY, - - *Respondents.*

AND

No. 408

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION No. 89, - *Petitioner,*

v.

C. W. MOORE, ET AL., - - - *Respondents.*

RESPONSE.

SECTION I.

Statement of Facts.

For his response to petitions 407 and 408, pending in this court, C. W. Moore, individually, and for and on behalf of members of the class, state that the facts in this case are set out in the petitions and in the opinion of the Kentucky Court of Appeals. For brevity's

sake, the essential fact involved is the right of the employees of Dealers to retain their jobs after Dealers has taken over certain secondary runs abandoned by E. & L. Company. The petitioners' statement of fact is misleading concerning the acquisition of these secondary runs by Dealers. They have taken a quote from the testimony of Mr. Snites out of context (page 7 of Walter Humphrey's petition). Also the petitioners have failed to present any of the facts concerning action on the part of Mr. Priddy and the members of Local 89 which denied to these respondents a fair hearing before the full committee and showed discrimination by the union. These matters will be discussed later in this brief.

SECTION II.

The Issues.

This is a suit by a group of employees against their union and their employer for injunctive relief to protect the rights of the individual employees under an existing, effective, binding collective bargaining agreement.

The real defendant is Local #89, The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereinafter referred to as "Local #89". While both Dealers Transport Co., hereinafter referred to as "Dealers" and E. & L. Transport Co., hereinafter referred to as "E. & L." are parties defendant to this suit, they are not actual defendants. This is, therefore, the question of the

rights of a group of the members of a union to the benefits of the collective bargaining agreement, where that group has been unfairly treated by the union and have lost their rights under the contract. The Kentucky Court of Appeals found that these respondents had lost their rights under the existing contract by reason of the arbitrary ruling made by the union at the so-called Joint Conference Committee meeting in Detroit, Michigan.

The petitions have unduly complicated the issues. They have quoted extensively from a number of cases and have quoted rules of law but have failed to apply those rules of law to the issues herein involved. Accordingly, we shall present the issues without attempting to argue the general principles of law set out in petitioners' application.

The first issue is whether the state court had jurisdiction. It is well settled that the state courts have jurisdiction where enforcement of a contractual right is the issue. The recent case of Doyle Smith v. Evening News Association, #13 on the October term of this court, decided December 10, 1962, 31 Law Week, 4041 (other citations not now available) holds that a state court has jurisdiction of an action by an employee against the employer for damages for violation of collective bargaining agreement. In that case, it was also admitted that there was an unfair labor practice committed by the employer which would give the National Labor Relations Board jurisdiction. This Court held that since there is also a contractual right involved, the individual employee has a right to main-

tain his action for damages in the state court, and the mere fact that there is jurisdiction in both bodies does not deprive the employee of this right. The court stated:

> "The authority of the Board to deal with an unfair labor practice which also violates the collective bargaining contract is not displaced by section 301, but it is not exclusive, and does not destroy the jurisdiction of the courts in suits under section 301."

Since there was no unfair labor practice involved in the present litigation, the case has not been pre-empted to federal jurisdiction even before the Doyle Smith case. But, certainly in view of that decision and the other recent decisions cited therein, the state court of Kentucky did have jurisdiction to try and hear the present case.

The case of International Association of Machinists v. Marcos Gonzales, 356 U. S. 617, 620, 2 Law Ed. 2d 1018, 78 Sup. Ct. 923, held that federal legislation had not pre-empted the field where breach of contract governing the relations between the employee and the union is the issue before the state court. The court stated:

> "In either case, the potential conflict is too contingent, too remotely related to the public interest expressed in the Taft-Hartley Act, to justify depriving state courts of jurisdiction to vindicate the personal rights of an ousted union member. This is emphasized by the fact that the subject

matter of the litigation in the present case, as the parties in the court conceived it, was the breach of a contract governing the relations between respondent and his unions."

In Association v. Westinghouse Electric Corp. Company, 348 U. S. 437, 460, 99 L. Ed. 510, 75 Sup. Ct. 488, the court stated:

> "The employees have always been able to enforce *their individual* rights in the state courts. They have not been hampered by the rules governing unincorporated associations. To this extent, the collective bargaining contract has always been 'enforceable'."

Textile Workers Union v. Lincoln Mills of Alabama, 77 Sup. Ct. 912, 353 U. S. 448, 453, 1 Law Ed. 972;

> "Once parties have made a collective bargaining contract, the enforcement of that contract should be left to the usual processes of law and not to the National Labor Relations Board."

It is, therefore, apparent that the state courts have jurisdiction of this case.

The second issue is whether the court had the power to set aside the arbitration ruling made by the Joint Conference Committee. It seems apparent that if the Kentucky court has the power to interpret and decide the rights of C. W. Moore and others to the collective bargaining contract in existence, that they have the power to enforce their rights under that contract by means of the injunction which set aside the unfair, unjust decision of the Joint Committee.

The law in Kentucky with regard to setting aside the decision of an arbitration board, or committee, or arbitrator is established. It can and should be done if there is gross mistake of law or fact constituting evidence of misconduct amounting to fraud or undue partiality. Smith, *et al.* v. Hillerich and Bradsby Co., Ky. 1952, 253 S. W. 2d 629. In Normal v. Southern Bell Telephone & Telegraph Co., 322 S. W. 2d 95, Ky. 1959, the court in discussing the ruling of an arbitration committee stated:

> ". . . it is to be expected any court would set aside and correct any ruling which refuses a pension for some reason that is not founded on justice."

The issue, therefore, under Kentucky law, is whether the decision of the Joint Conference Committee is founded on justice, or whether there is a gross mistake of law or fact constituting evidence of fraud or undue partiality. If either of these conditions exist, the court should set aside the decision of the arbitration committee.

It is the duty of the chosen representative or union to bargain with the employer for and on behalf of the employees in that the said union cannot discriminate against any particular group of union membership or activity. Conley v. Gibson, 355 U. S. 41, 46, 2 Law Ed. 2d 80, 78 Sup. Ct. 99, held:

> "A contract may be fair and impartial on its face yet administered in such a way, with the

active or tacit consent of the union, as to be flagrantly discriminatory against some members of the bargaining unit."

Ford Motor Company v. Huffman, 345 U. S. 330, 336:

"The National Labor Relations Act as passed in 1935, as amended in 1947, exemplifies the faith of Congress in free collective bargaining between employers and their employees when conducted by freely and fairly chosen representatives of appropriate units of employees. That the authority of bargaining representatives, however, is not absolute is recognized in Steele v. L & N Railroad Co., 323 U. S. 192, 198, 199, 89 Law Ed. 173, 65 Sup. Ct. 226, in connection with comparable provisions of the Railway Labor Act. Their statutory obligation to represent all members of an appropriate unit requires them to make an honest effort to serve the interests of all those members, without hostility to any."

In the case of United Steel Workers of America v. Enterprise Wheel and Car Corporation, 363 U. S. 593, 597, 4 Law Ed. 2d 1424, 80 Sup. Ct. 1358, the court discussed the powers and authority of an arbitrator.

"When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of the problem . . . Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet

his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award."

This case, therefore, presents no questions which have not heretofore been considered by this honorable court, nor does it present any questions which will adversely affect the collective bargaining processes. It rather involves the interpretation of a contract and the secondary question of whether the Joint Conference Committee, failed to properly interpret the contract. The Kentucky Court of Appeals found the Joint Conference Committee ruling to be unjust and granted the injunction to these respondents. This court should not involve itself with the question of interpretation of this contract. However, we will discuss briefly the reasons that the decision of the Kentucky Court of Appeals is correct and that the decision of the Joint Conference Committee was, in fact, unjust, unfair and discriminatory as to these respondents.

The record discloses that Dealers did not buy any of the assets of E. & L.; that there was never any discussion of Dealers buying E. & L.; that there was never any agreement or indication that employees of E. & L. were to become employees of Dealers until after this grievance was filed. The only so-called merger or "Absorption of business" was that Dealers took over certain secondary runs formerly held by E. & L. in order to geographically consolidate Dealers' activities. Under these circumstances, it is difficult to

believe that Article IV, Section 5 is applicable as is contended by the petitioners. If it was not applicable there was no question to have been arbitrated under the agreement. The question of whether an issue is to be arbitrated under an agreement is a judicial question for the courts to determine. Harbison-Walker Refrac. Co. v. United Brick & C Works, Ky. 1960, 339 S. W. 2d 933; see also 24 ALR 2d at page 757, *et seq.* There was no issue to be arbitrated under Article IV, Section 5 of the Truckaway Agreement unless there was an absorption of business within the meaning of the contract. The facts do not justify a finding that Dealers absorbed the business of E. & L. For this reason there was no issue to be arbitrated by the Joint Conference Committee and its decision cannot stand.

Even if we assume Dealers did absorb the business of E. & L. and that this question was to be arbitrated under Article IV, Section 5 of the Truckaway agreement, the court is still confronted with the question of whether the decision reached by the Joint Conference Committee is so unjust, unreasonable and unfair as to prevent its enforcement. The decision reached is contrary to the explicit provisions of the Truckaway contract and it discriminates against a group, the respondents in this case, who were a group of employees of Dealers and members of Local #89. They were entitled to be fairly and honestly represented by their collective bargaining agent. Accordingly, it is the position of these respondents that the decision reached by the Joint Conference Committee was arbitrary, unreasonable and unjust because it violates the

explicit provisions of the contract, and further that the decision of the Joint Conference Committee cannot stand because these respondents were denied their right to be fairly represented by Local #89. This contention is based upon the fact that they were continuously assured of a favorable decision up until the time of the hearing at Detroit, and all of the circumstances indicate their rights were not protected by their collective bargaining agent.

Article IV, Section 1, of the Truckaway contract specifically provides:

> "Terminal seniority shall prevail at all times except as provided for in Article IV, Section 6, Sub-section B-2."

There was a supplemental agreement to the original contract in effect which provided:

> "The Louisville domiciled employees of the employer (employer being Dealers), shall have exclusive rights to all the work originating at the Louisville terminal."

Article IV, Section 6, Sub-section B-2, provides that when a branch terminal divisional operation is closed or partially closed, the employees at the partially closed branch terminal shall have "the right to transfer to the branch terminal divisional operation into which the work was transferred, if regular work is there available. Such employee, however, shall go to the bottom of the seniority board and shall have the right of job selection only in accordance with his seniority at such

terminal." It is apparent that this Truckaway Agreement contract intends to preserve the rights of an employee to continue working at the terminal which is his regular and fixed place of employment. In this case, respondents were regular employees of Dealers who were employed at the terminal in Louisville. Therefore, under this contract, they are the terminal employees whose rights are to be protected. This fact and the obvious intent of the contract was completely ignored by the Joint Conference Committee when it decided to "sandwich in" the employees of Dealers with those of E. & L.

This same contract was in effect with the employees of E. & L. As the Kentucky Court of Appeals pointed out that should not make any difference to the rights of Dealers under its contract since it was a contract intended to protect the rights of Dealers first and foremost which is being decided in this controversy. But, the Joint Conference Committee by its decision is obviously giving to the employees of E. & L. rights to which they were not entitled under their contract, and this to the detriment of the respondents. The contract specifically provides under Article IV, Section 6, as above quoted that when a branch or terminal or division or operation is closed or partially closed, which is exactly the situation when E. & L. gave its secondary runs to Dealers, that the employees of such partially closed branch or division may go over to the other branch and seek regular employment, but that they do so only on condition that they go to the bottom of the seniority board. Therefore, if the employees of E. & L.

go to work for Dealers under the provisions of this contract, then they specifically go to the bottom of the seniority board. For the Joint Conference Committee to give the employees of E. & L. rights to which they were not entitled under their contract and take away rights to which employees of Dealers were entitled is obviously unjust, unfair and discriminatory.

The employees of E. & L. who filed this grievance were not employees of Dealers at the time the grievances were filed and had no rights under the contract and so far as we can determine had no right to file this grievance. Regardless of this, the grievance was considered and after being deadlocked at the Louisville hearing, it was referred to the Joint Conference Committee at Detroit and the decision was rendered against the employees of Dealers. These respondents who were the original employees of Dealers were continuously assured by Leslie Aterbury and Paul Priddy, the president and assistant of Local 89 at Louisville, that they had nothing to worry about, that the grievance would be denied, that they would not lose their jobs and that the seniority acquired by employees of Dealers would prevail. These facts are proven by the testimony of the respondents as well as by the testimony of Leslie Aterbury. Now the representatives of Local 89 contend that when they got to Detroit they gained other information which caused them to change their opinion. However, David E. Stovall, personnel and safety director for Dealers, testified that Paul Priddy knew even before he left for Detroit that Hoffa, International president, was thinking that em-

ployees of both concerns would have to be sandwiched in and that Paul Priddy had told Stovall that this was to be the case. This obviously is true since it evidences the power of the union if it can make the seniority of employees cut horizontally across lines of more than one employer. Regardless of these facts, it was only 15 minutes before the actual decision was rendered that these respondents, who were not qualified to represent themselves, were advised that they had better get busy and protect their rights. Obviously they had no representation at the hearing when the persons upon whom they were relying, that is the president and vice-president of Local 89 suddenly told them that they were going to be on the other side of the fence. Under these facts, can it possibly be said that the collective bargaining agent for the employees of Dealers fairly and honestly represented their rights. In fact, isn't it true that such circumstances conclusively show that the rights of the employees of Dealers under the contract were ignored and that they were discriminated against by their own collective bargaining agent.

SECTION III.

The Conclusion.

The decision of the Joint Conference Committee was arbitrary, unreasonable, unjust and denied to these respondents their rights under a valid, existing, collective bargaining agreement known as the Automobile Carrier Truckaway Agreement. The decision was reached in an unfair, arbitrary manner which denied to these respondents their right to fair and honest representation by their collective bargaining agent, Local 89.

The state courts of Kentucky had jurisdiction to try and render a decision in this case since it involved the interpretation of an existing contract. Kentucky courts now have and have always had jurisdiction to try and render a decision in a case involving contractual rights of residents of Kentucky. Such rights were not taken away or pre-empted by federal legislation under the National Labor Relations Act as amended.

There is no federal question of substance which would justify this court granting certiorari to hear the present case. This is not a case, as contended by the petitioners, where disgruntled employees are making a mirage of the bargaining process. The facts show, and the Kentucky court found, that there was discrimination and an unfair and unjust decision reached by the Joint Conference Committee. The Kentucky courts have done nothing more than they have always

had the right to do and there is no question presented to this court which should again be considered.

We respectfully submit that the petitions for Writ of Certiorari should be denied.

Respectfully submitted,

BROWN, SLEDD & MCCANN,
JOHN Y. BROWN,
601 Security Trust Bldg.,
Lexington, Kentucky,
Counsel for Respondents.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

Nos. ~~107~~ and ~~108~~ 17 & 18

WALTER HUMPHREY, ETC., ET AL,
Petitioners,

v.

C. W. MOORE, ETC., ET AL, GENERAL DRIVERS, WAREHOUSEMEN, AND HELPERS, LOCAL UNION NO. 89, AND DEALERS TRANSPORT COMPANY,
Respondents,

and

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 89, Petitioner,

v.

C. W. MOORE, ET AL
Respondents.

BRIEF OF DEALERS TRANSPORT COMPANY IN RESPONSE TO THE PETITIONS FOR A WRIT OF CERTIORARI

Newell N. Fowler
81 Madison Building
Memphis, Tennessee
Earl W. DeHart
81 Madison Building
Memphis, Tennessee
Counsel for Respondent,
Dealers Transport Co.

TODD-MEMPHIS

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

Nos. 407 and 408

WALTER HUMPHREY, ETC., ET AL,
Petitioners,

v.

C. W. MOORE, ETC., ET AL, GENERAL DRIVERS, WAREHOUSEMEN, AND HELPERS, LOCAL UNION NO. 89, AND DEALERS TRANSPORT COMPANY,
Respondents,

and

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 89, Petitioner,

v.

C. W. MOORE, ET AL
Respondents.

BRIEF OF DEALERS TRANSPORT COMPANY IN RESPONSE TO THE PETITIONS FOR A WRIT OF CERTIORARI

QUESTIONS PRESENTED

1. Whether a suit brought by individual employees in a state court against a labor organization and an employer, parties to a collective bargaining agreement, to enjoin their enforcement of an arbitration award rendered pursuant to such an agreement is within the purview of Section 301 of the National Labor Relations Act so as to require that the law applied in reaching a decision be consistent with the body of federal labor law.

2. Whether a state court's jurisdiction over the above-described cause of action is pre-empted by the exclusive jurisdiction of the National Labor Relations Board in that enforcement of the arbitrational award might result in conduct arguably prohibited by Section 8 of the National Labor Relations Act.

3. Whether individual employees have standing to bring a suit within the purview of Section 301 in a state court.

4. Whether a state court's decision in the above-described action is inconsistent with the national labor policy where such decision set aside an arbitration award on the ground that, under the terms of the collective bargaining agreement, the matter considered by the arbitration committee was not in fact arbitrable and that, if the matter were to be considered arbitrable, the award of the arbitration committee was nevertheless arbitrary and erroneous.

STATEMENT OF THE CASE

It appearing that the facts set forth in the opinion of the Court of Appeals of Kentucky are substantially accurate and complete and it further appearing that the questions presented in this matter are essentially questions of law, Dealers Transport Company, in an effort to prevent this Court's having to duplicate its efforts, accepts those facts as an adequate statement of the case.

ARGUMENT

The Plaintiffs in the court below are employees of Dealers Transport Company and as such they are subject to the terms of the collective bargaining contract between that employer and the bargaining representative of its employees, General Drivers, Warehousemen and Helpers, Local Union No. 89. In their complaint in the lower court

these employees sought court relief to insure their retention of certain rights which they contended inured to them under the terms of the collective bargaining agreement. It would appear that such a cause of action would fall directly within the ambit of Section 301. This being the case it would appear incumbent upon the lower court in exercising jurisdiction to apply federal labor law under this court's decision in *Lucas Flour Company.*[1]

Since this court's decision in *Dowd Box Company* v. *Courtney,* 368 U.S. 502, little doubt remains as to the concurrent jurisdiction of the state and federal courts in matters arising under Section 301. However, the question of pre-emption by the exclusive jurisdiction of the National Labor Relations Board remained opened until this court's recent decision in *Smith* v. *Evening News Association.*[2] In that case an employee sued his employer in a state court for back pay arising from the employer's refusal during a strike to pay wages to the employee who was a member of a union having a collective bargaining contract with the employer even though wages were paid to other non-striking non-union employees. In reversing and remanding to the state court which had dismissed the suit for lack of jurisdiction Mr. Justice White, speaking for the majority of the court, said:

> *Lucas Flour* and *Dowd Box,* as well as the later *Atkinson* v. *Sinclair Refining Co.,* 370 U.S. 238, were suits upon collective bargaining contracts brought or held to arise under Section 301 of the Labor Management Relations Act and in these cases the jurisdiction of the courts was sustained although it was seriously urged that the conduct involved was arguably protected or prohibited by the Labor Management Relations Act and therefore within the exclusive jurisdiction of the National

Labor Relations Board. In *Lucas Flour* as well as in *Atkinson* the Court expressly refused to apply the pre-emption doctrine of the *Garmon* case; and we likewise reject that doctrine here where the alleged conduct of the employer, not only arguably, but concededly, is an unfair labor practice within the jurisdiction of the National Labor Relations Board. The authority of the Board to deal with an unfair labor practice which also violates a collective bargaining contract is not displaced by Section 301, but it is not exclusive and does not destroy the jurisdiction of the courts in suits under Section 301. If, as respondent strongly urges, there are situations in which serious problems will arise from both the courts and the Board having jurisdiction over acts which amount to an unfair labor practice, we shall face those cases when they arise. This is not one of them, in our view, and the National Labor Relations Board is in accord.

1/ Local 174, Teamsters v. Lucas Flour Company, 369 U.S. 95.
2/ No. 13, October Term, 1962, decided December 10, 1962.
3/ 356 U.S. 617

We therefore respectfully submit that the decision of the Court in the *Evening News Association* case is binding in regard to the question of pre-emption by the Labor Management Relations Act.

Insofar as the Court may wish to consider upon the question of pre-emption that portion of the complaint below dealing with the matter of alleged arbitrary representation by the collective bargaining representative, the decision in *Association of Machinists* v. *Gonzales*[1] appears apposite. There a union member sued in a state court for damages and restoration of membership due to his illegal expulsion from the union. In affirming the state court's judgment ordering reinstatement and payment of damages,

this Court recognized that the action was premised not on the ground that the union's conduct was designed to effect employer discrimination against an employee, the issue customarily treated by the Board under Section 8 (b) (2), but rather was grounded upon the matter of discrimination by the union against the individual as a member of the labor organization. We submit that a parallel may be drawn between that case and the instant proceeding, recognizing that the present case involves an attempt to enjoin action by the collective bargaining representative which may affect the employment tenure in an atmosphere in which the employer is neutral as to such action.

With regard to the question whether an individual employee has standing to bring a suit within the purview of Section 301 the decision of the Court in *Evening News Association, supra,* again appears dispositive. There the Court in refusing to restrict the scope of Section 301 to suits between an employer and a labor organization said:

> The concept that all suits to vindicate individual employee rights arising from a collective bargaining contract should be excluded from the coverage of Section 301 has thus not survived. The rights of individual employees concerning rates of pay and conditions of employment are a major focus of the negotiation and administration of collective bargaining contracts. Individual claims lie at the heart of the grievance and arbitration machinery, are to a large degree inevitably intertwined with union interests and many times precipitate grave questions concerning the interpretation and enforceability of the collective bargaining contract on which they are based. To exclude these claims from the ambit of Section 301 would stultify the congressional policy of having the administration of collective bargaining

contracts accomplished under a uniform body of federal substantive law. This we are unwilling to do.

On the basis of this decision it appears and we respectfully submit that the individual employees had standing to bring the action in the court below.

As correctly noted by the court below the position of Dealers Transport Company in this matter has been one of neutrality. It desires to remain neutral. Therefore, while we have attempted to respond to those questions presented by the petitions pertaining to jurisdiction and the standing of the parties, we respectfully choose to take no position on the lower court's disposition of the matter on the merits.

CONCLUSION

In sum, we respectfully contend that the subject matter of the suit in the court below is within the purview of Section 301 of the National Labor Relations Act and that the law applied in reaching a decision must be consistent with the body of federal labor law. Further, on the basis of the authorities cited, we contend that the lower courts jurisdiction is not pre-empted by the exclusive jurisdiction of the National Labor Relations Board and that the individual employees, plaintiffs below, had standing to bring such an action.

Respectfully submitted,

Newell N. Fowler
81 Madison Building
Memphis, Tennessee

Earl W. DeHart
81 Madison Building
Memphis, Tennessee

Certificate of Service

I certify as attorney of record for Dealers Transport Company in the above-styled and numbered cause in this Court that I have this day had mailed by air mail, postage prepaid, to David Previant, 511 Warner Building, Milwaukee 3, Wisconsin, Mozart G. Ratner, 1411 K Street, N.W., Washington, D.C., and to John Young Brown, 601 Security Trust Building, Lexington, Kentucky, counsels respectively for the Petitioners in Case No. 408, the Petitioners in Case No. 407, and the Respondents C. W. Moore, etc., et al, at their said proper post office addresses, two true copies each of this Brief in Response to the Petitions for a Writ of Certiorari.

This 8th day of January, 1963.

Newell N. Fowler

Newell N. Fowler
81 Madison Building
Memphis, Tennessee

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 18

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION No. 89,

Petitioner,

v.

C. W. MOORE, *et al*,

Respondents.

ON A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY

BRIEF FOR THE PETITIONER

DAVID PREVIANT
511 Warner Building
Milwaukee 3, Wisconsin

HERBERT S. THATCHER,
DAVID S. BARR
1009 Tower Building
Washington 5, D. C.

RALPH H. LOGAN
506 West Jefferson Street
Louisville 2, Kentucky

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Summers, "Collective Power and Individual Rights in the Collective Agreement—A Comparison of Swedish and American Law," 72 Yale L. J. 421 (1963) 27, 47

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 18

GENERAL DRIVERS, WAREHOUSEMEN, AND HELPERS LOCAL UNION NO. 89,

Petitioner,

v.

C. W. MOORE, *et al,*

Respondents.

ON A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals of Kentucky (R. 25-34), is reported at 356 S.W.2d 241. The Orders and opinion of the Jefferson Circuit Court, Chancery Branch, First Division (R. 17-19, 22), are unreported.

JURISDICTION

The judgment and order of the Kentucky Court of Appeals was entered on February 13, 1962 (R. 24-35), and a Petition for Rehearing was denied on May 4, 1962 (R. 35), making such judgment final. On July 17, 1962, Mr. Justice Stewart entered an Order extending to September 4, 1962 the Petitioner's time for the filing of the Petition for a Writ of Certiorari (R. 62-63). The Court granted the Petition on January 21, 1963 (R. 63-64).

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

STATUTES INVOLVED

The relevant provisions of the Labor Management Relations Act, 1947, 61 Stat. § 136, 29 U.S.C. § 141, et seq., are as follows:

SEC. 8(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder • • •

SEC. 9(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

SEC. 203(d) Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement • • •

SEC. 301(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

QUESTIONS PRESENTED

1. Whether a court may, consistent with federal law, set aside an interpretation of a collective bargaining agreement rendered by a Committee composed of representatives of the contracting parties, whose decisions are designated by said agreement as being final and binding, on the ground that in the court's own judgment as to the scope, coverage and meaning of the contract in question the dispute was not properly before the Committee.

2. Whether federal law permits judicial interference with an agreement of the parties made through the afore-mentioned Committee, which calls for the dovetailing (merging) of seniority of employees of two companies that are members of a multi-employer bargaining unit upon the absorption of the operation of one such company by the other.

3. Whether a court may, consistent with federal law, set aside the decision of the Committee because, in its view of the merits of the dispute, the decision was erroneous.

4. Whether the complaint contained sufficient allegations to give rise to an issue as to whether the Union had breached its duty of fair representation and, if so, whether a breach of such duty had been proved in the instant case.

5. Whether individual employees within the bargaining unit have standing to contend in the courts that the aforesaid decision to dovetail seniority constituted a breach of the collective agreement, where the agreement reserves the handling of grievances and the interpretation of its substantive provisions to the exclusive authority of the Union and the Employer.

STATEMENT

A. The Facts

The petitioner (defendant-appellee below), General Drivers, Warehousemen and Helpers, Local Union No. 89, (hereafter referred to as "Local 89"), is an unincorporated

association and labor organization representing employees for the purpose of collective bargaining and is affiliated with the National Truckaway and Driveaway Conference (hereafter called the "National Conference") and with the International Brotherhood of Teamsters. (R. 1-2, 45, 54).

Dealers Transport Company (hereafter called "Dealers"), also a defendant-appellee below, is a corporation of the State of Tennessee, having offices at Louisville, Kentucky, and operating a trucking business primarily throughout the southern portion of the United States. (R. 2, 42). E & L Transport Company (hereafter called "E & L"), not a party to these proceedings, is a Michigan corporation having offices at Louisville, Kentucky, and operating a trucking business there and in other parts of the United States (R. 2, 42). Respondents here, plaintiffs-appellants below, as a class, are employees of Dealers and members of Local 89. (R. 1, 39).

Local 89 has for many years represented the employees of both Dealers and E & L and other companies, all of whom are members of a multi-employer, multi-local union bargaining unit (R. 13, 39, 51-52, 54). Identical contracts between the employers and the unions are negotiated and concluded on behalf of the unions by the National Conference, and on behalf of the employers by the Automobile Transporters Labor Division. (R. 8-14, 39, 51-52). The current agreement, known as the "Automobile Carrier Truckaway Agreement," covers the period of March 1, 1961 through February 29, 1964 (R. 2, 8). Both Dealers and E & L are signatories to the Agreement. (R. 51-52).

The said Agreement provides, in Article 1, Section 1, that the employer recognizes the National Conference, on behalf of its member locals, as the exclusive representative of all employees. (R. 9). Under Article 38, the employer "agrees to be bound by all of the terms and provisions of this Agreement, and . . . by the interpretations and enforcement of the Agreement." (R. 13). He also agrees "to be-

come a part of the multi-employer unit set forth in the Agreement." (R. 13).

Article 4, Section 1 establishes the principle that "seniority rights for employees shall prevail," provides for the posting of seniority lists, and states: "Any controversy over the employees' standing on such lists shall be submitted to the joint grievance procedure (ARTICLE 7)" (R. 9). Section 5 of Article 4 provides as follows:

> In the event that the Employer absorbs the business of another private, contract or common carrier, or is a party to a merger of lines, the seniority of the employees absorbed or affected thereby shall be determined by mutual agreement between the Employer and the Unions involved. Any controversy with respect to such matter shall be submitted to the joint grievance procedure. (Article 7). (R. 10).

Article 6 establishes a Local Joint Committee and a Joint Conference Committee, each composed of an equal number of union and employer representatives, for the purpose of settling contract disputes "which cannot be settled by the Employer and the Local Union. . . ." (R. 10-11, 40). Article 7, Section 1, states:

> The Unions and the Employers agree that there shall be no strike, tie-up of equipment, slow-downs or walkouts on the part of the employees, nor shall the Employer use any method of lock-out or legal proceeding without first using all possible means of a settlement, as provided for in this Agreement, of any controversy which might arise. (R. 11).

The grievance procedure calls for the following steps: Initial discussion between the employer and union, followed by submission to the Local Joint Committee, appeal to the Joint Conference Committee and, finally, submission to an impartial board of arbitration. (R. 11-12). It is further provided, in Section 2(d), that "all matters pertaining to the interpretation of any provision of this Agreement, whether requested by the Employer or the Union, must be submitted to the . . . Joint Conference Committee." (R. 12). Sections 2(e) and (f) provide that "any decision of the . . .

Joint Conference Committee shall be final and conclusive and binding upon the Employer and the Union, and the employees involved,"[1] (R. 12), it being "the intention of the parties to resolve all questions of interpretation by mutual agreement." (R. 13).

The principal business of both Dealers and E & L in Louisville was carrying automobiles for the Ford Motor Company. (R. 41). In 1961, due mainly to increased "piggyback" activity by the railroads, Ford informed these companies that only one of them was needed to carry on the operation without indicating which company was to stay. (R. 41-42). Accordingly, Dealers and E & L agreed that Dealers would purchase E & L's "secondary authority" in the South, and E & L in turn would purchase Dealers' "initial authority" out of Lorraine, Ohio along with certain physical assets there. Thus, each company would consolidate its operations geographically. (R. 39, 42-43, 53). To accomplish these objectives, the companies filed applications with the ICC. (R. 42-43, 53).[2]

However, the true nature of these transactions was not revealed to the Union or the employees involved (R. 47, 49, 57). For some time prior to August, rumors were rampant that Ford had ordered the cessation of E & L's operations. (R. 50). Paul Priddy, President of Local 89, instructed his assistant, Leslie Atterbury, to determine whether the proposed arrangement was to be "a sale, merger, trade or whatever it might be." (R. 57). Atterbury was told by officials of both companies that "there was no kind of a trade, understanding at all, between management of the two companies" and that Ford "had seen fit to take the business from one carrier and give it to another carrier." (R. 47, 57). With this "current available information" in mind, Priddy and Atterbury told the E & L employees that they had bet-

[1] With regard to the finality and binding effect of grievance decisions, this contract is more explicit than was the contract before this Court in *Drivers Union* v. *Riss & Co.*, 9 L. Ed. 2d 918 (1963).

[2] Subsequently, the applications were approved by the ICC. 87 MCC 785 (Dec. 29, 1961).

ter look for other jobs and Atterbury assured the Dealers employees that they had nothing to worry about. (R. 45-47, 49, 57).

In August, 1961, however, in the light of continuing speculation about a deal between Dealers and E & L and as the layoffs at E & L accelerated, the E & L employees filed a grievance claiming that pursuant to Article 4, Section 5 of the collective bargaining agreement, *supra*, they were entitled to be employed by Dealers while retaining the seniority status they had enjoyed at E & L (R. 2-3, 37, 55). In short, the gist of their grievance was that upon the consummation of the current transactions involving the two companies the seniority boards of both should be merged.[1]

Local 89 carried the grievance to the Local Joint Committee where, pursuant to Article 7, Section 2(d) (R. 48), the matter was "deadlocked" by unanimous vote for submission to the Joint Conference Committee (R. 48-49, 55-56). By this time, Local 89 had knowledge of Dealers' application to the ICC to obtain E & L's secondary authority out of Louisville, but remained unaware of the agreement that had been reached between the two companies. (R. 47, 49-50, 57).

On October 18, 1961, the grievance came before the Joint Conference Committee in Detroit (R. 3, 59). The Dealers employees were represented in Detroit by three union shop stewards, who had been elected to their posts by the Dealers employees and who made the trip at the Union's expense (R. 36-40, 49,54). Shortly before the hearing, Paul Priddy informed these shop stewards that on the basis of information indicating an arrangement between Dealers and E & L he favored the dovetailing of seniority as between the two groups of employees involved (R. 56). Priddy, ordinarily a member of the Committee, withdrew from the panel and did not participate in the decision pursuant to an "automatic" rule of the Committee requir-

[1] This process, whereby the seniority of separate groups of employees is merged on a single list, is commonly known as "dovetailing" of seniority.

ing such withdrawal by any member who wishes to argue to the Committee or within whose jurisdiction the grievance arose. (R. 50-51, 56, 58).

At the start of the hearing, Mr. Priddy presented the facts to the Committee and recommended that the seniority lists be dovetailed, pointing out that such action would in the long-run aid the larger part of the working force, including the Dealers employees who stood to be hurt at present (R. 57-58). He noted that since E & L's operation was to be taken over by Dealers, the employees of the former, under the proposed dovetailing arrangement, would in effect be "following their work." (R. 57-58). On the other hand, said Priddy, if such arrangement were not adopted, the E & L employees—most of whom had greater seniority than the Dealers employees—would either lose their jobs or go to the bottom of the list at Dealers, thus losing credit for many years of service within the multi-employer, multi-local union bargaining unit (R. 57-59).[4] Mack Snites, Dealers' Vice-President and General Manager, also made a statement to the Committee, outlining the details of the Dealers— E & L agreement and admitting frankly that Dealers had "absorbed a certain portion" of E & L's business. (R. 44, 58). The Dealers shop stewards spoke up for their cause, making no allegations as to inadequate representation. (R. 37-40, 51).

Thereafter, the Joint Conference Committee issued a unanimous decision, ordering the merger of seniority boards of Dealers and E & L within thirty days. (R. 3-4, 59-60). Following the decision, and during the trial below, Dealers began to comply with the award while E & L con-

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[4] During trial below, Priddy testified that his position before the Committee was in no way motivated by prejudice for or against either faction of employees and would have been the same "had the other company been the successful one to stay." (R. 58). He conceived it to be the duty of the Union, representing the employees of both companies "to protect people in spite of themselves." (R. 58-59).

tinued to operate in Louisville with 25 to 30 men—pending decision on their applications to the ICC. (R. 44-45, 61).*

B. Proceedings Below

On November 8, 1961, C. W. Moore, an employee of Dealers, instituted a class suit for himself and about 300 other employees similarly situated against Local 89, the International Brotherhood of Teamsters, and Dealers in the Jefferson Circuit Court, Chancery Branch, First Division in Kentucky. (R. 1-8). By amended complaint, representatives of the E & L employees (petitioners in Case No. 17 were added as defendants. (R. 15). Count I of the complaint alleged that plaintiffs had relied on the union to present their case through the grievance process; that the union had deceived them and failed to represent them; that the decision of the Joint Conference Committee was "contrived" by the union; that the said decision was arbitrary and capricious and in violation of the collective bargaining agreement; and that plaintiffs, having lesser overall seniority than E & L employees, were being deprived of their jobs by the decision. Accordingly, Count I sought to enjoin implementation of the Committee's ruling by Dealers and the Union. Count II repeated the above and, as an alternative to injunction, sought damages in the amount of $6,625,000. (R. 1-8).

Defendants Local 89 (petitioner here) and E & L employees moved to dismiss the complaint for its failure to state a cause of action (R. 16, 21). Local 89 also moved for dismissal on the ground of NLRB preemption of jurisdiction (R. 21).

After hearings held in November and December, the court denied plaintiffs' motions for a temporary and a permanent injunction and granted the motions to dismiss

* It was assumed that, pursuant to the Committee award, E & L would in turn employ the Dealers employees at Lorraine, Ohio, on the basis of the same seniority arrangement. (R. 43-44).

(R. 17-19, 22).[6] The court observed that no contention had been made that the facts surrounding the "absorption" had not been truthfully disclosed to the Committee. (R. 18). It further observed that "there were three shop stewards from Dealers Transport attending the Detroit meeting, and it would be a matter of idle speculation to assume that the result would have been different had the matter been differently presented." (R. 18-19). The court agreed with the Committee that "the provisions of Article 4, Section 5 . . . governed this state of facts" and concluded that "a binding determination of the controversy was made in Detroit on October 18, 1961." (R. 19).

Upon plaintiffs' appeal to the Kentucky Court of Appeals, that court, on December 15, ordered the submission of the case on the record and briefs and immediately reversed the decision of the trial court,[7] noting that an opinion would be rendered later. (R. 19-20, 23, 24-25). The opinion of the Court, rendered February 13, 1962, was as follows: First, the Court stated that the Committee's interpretation of Article 4, Section 5 was erroneous in that the provision "deals only with seniority, and not with initial employment." In short, it does not become applicable "unless and until the absorbing company agrees to take the employees of the company whose business is being absorbed." (R. 30-31). Furthermore, said the Court, even though the contracts signed by Dealers and E & L are identical, "still they are separate agreements" and the E & L employees can claim no benefits or rights under the Dealers contract. (R. 31). For these reasons, "the question was not arbitrable under the grievance procedure." (R. 31). Second, the Court stated that "two antagonistic interests were represented by the same advocate at Detroit" and "this of itself is enough to destroy the tradi-

[6] Also granted was defendant International's motion to dismiss as to itself (R. 17).

[7] It did, however, uphold the dismissal of the complaint as to the International because of its insufficient "connection with the controversy." (R. 29-30, 34-35).

tional presumption in favor of an arbitration award." (R. 32). The Court further noted that "the influence of the union stood to be enhanced by a decision permitting the employment and seniority of its members to cut horizontally across company lines." (R. 32). The Court concluded: "When we view the erroneous decision of the Detroit committee against such a background we judge it as having been arbitrary and violative of natural justice." (R. 32-33). Two judges dissented without opinion. (R. 34). On May 4, 1962, the Court denied Petitioner's petition for rehearing. (R. 35).

SUMMARY OF ARGUMENT

I

The instant case arises under Section 301 of the Labor Management Relations Act. See *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 (1957); *Drivers Union* v. *Riss & Co.*; 9 L. Ed. 2d 918 (1963). Therefore the state courts had jurisdiction but were bound to apply federal law. *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238 (1962); *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95 (1962); *Dowd Box Co.*, v. *Courtney*, 368 U.S. 502 (1962); *Smith* v. *Evening News Assn.*, 371 U.S. 195, 9 L. Ed. 2d 246 (1962).

The federal law governing the case includes principles relative to multi-employer, multi-union bargaining units, the dovetailing of seniority, the union's duty of fair representation, and the relationship of union and individual rights under collective bargaining agreements, all of which, "taken together, shape the national labor policy". *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195 (1962).

As will be hereafter developed, the decision rendered by the Joint Conference Committee in the instant case could be viewed either as an agreement between the contracting parties pursuant to negotiations or simply as a grievance award, similar to arbitration, rendered pursuant to the

grievance procedure of the contract. Upon either view, however, the principles of Section 301 must be brought to bear, and the decision of the Committee to dovetail seniority should be upheld within the framework of applicable federal labor laws.

II

The court below was in error in holding, on the basis of its own interpretation of the contract, that the dispute was not properly before the Committee.

1. The national labor policy concerning the settlement of contractual disputes "can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play." *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 566 (1960). Accordingly, when the parties have agreed upon a method of settlement of disputes and have further agreed to utilize the prescribed method for the resolution of all such disputes, the courts have been admonished not to interfere beyond making a determination as to whether the dispute is "on its face . . . governed by the contract." *United Steelworkers* v. *American Mfg. Co.*, *supra*, at 568; see also *United Steelworkers* v. *Warrior and Gulf Nav. Co.*, 363 U.S. 574 (1960); *Drivers Union* v. *Riss and Co.*, 9 L. Ed. 2d 918, 920 (1963).

The desire of the parties in this case was expressed very clearly. They agreed to submit "any controversy" over seniority "to the joint grievance procedure." (R. 9; Art. 4, Sec. 1). They agreed to desist from using self-help methods "without first using all possible means of settlement . . . of any controversy which might arise." (R. 11; Art. 7, Sec. 1). The contract provided that "all matters pertaining to the interpretation of any provision . . . must be submitted to the . . . Joint Conference Committee" (R. 12, Art. 7, Sec. 2(d)), whose decision "shall be final and conclusive and binding upon the Employer and the Union and the employees involved." (R. 12; Art. 7, Sec. 2(e)).

Article 4, Sec. 5 provided that in the event of absorption or merger as between two companies "the seniority of the employees absorbed or affected thereby shall be determined by mutual agreement between the employer and the unions involved." (R. 10). The same provision directed that "any controversy with respect to such matters shall be submitted to the joint grievance procedure." Manifestly, the agreement of the parties was to submit to the Joint Committee all grievances and questions of interpretation arising under their contract, "not merely those that a court may deem to be meritorious." *United Steelworkers* v. *American Mfg. Co., supra,* at 567.

2. The position of the state court that the Dealers and E & L employees were covered by separate and independent contracts, one without effect upon the other, is subject to the same criticism. For the scope of coverage of a collective bargaining agreement is a matter of interpretation for the "tribunal" chosen by the parties to the same extent as are the substantive provisions thereof. *United Steelworkers* v. *American Mfg. Co., supra.* For that reason the question before the Court below was not whether the various parties comprised "one big happy family" (R. 31), but whether it may be fairly argued that they had agreed to be bound by one collective bargaining agreement.

Plainly they had so agreed. The basic contract was negotiated for the several local unions by the National Conference and on behalf of the several employers by the Automobile Transporters Labor Division (R. 8-14, 39, 51-52). Both Dealers and E & L are parties to that basic contract (R. 51-52), each having agreed to recognize the National Conference as the exclusive representative of all employees involved (R. 9; Art. 1, Sec. 1), and "to become part of the multi-employer unit set forth in the Agreement." (R. 13; Art. 38). All the parties are therefor a part of a multi-employer, multi-union, multi-state bargaining unit which receives recognition and sanction under the National Labor Relations Act. *NLRB* v. *Truck Drivers Local 449,* 353 U.S. 87, 94 (1952); *Motor Cargo Inc.,* 108 NLRB 716. The

federal policy holding that by the contractual establishment of a multi-party bargaining unit the parties "have demonstrated their desire to be bound by group rather than individual action". (*Balaban and Katz*, 87 NLRB 1071, 1073), negates both the assertion of the state court that the E & L employees were "strangers to the Dealers contract" and its underlying assumption that "separate agreements" were in effect (R. 31). Thus the conclusion of the court below had the effect of fragmentizing a bargaining unit favored by the Act and debilitating the undeniable discretion of the bargaining representatives to determine for themselves "the unit within which seniority is to be computed." *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 337 (1953).

III

Since the issue of seniority was properly before the Joint Conference Committee, the resulting determination—constituting a negotiated agreement between the contracting parties—was not subject to judicial review.

1. Article 4, Section 5 which formed the basis of the determination of the Joint Conference Committee (R. 10), states that in the event of the absorption of one business into another, "the seniority of the employees absorbed or affected thereby shall be determined by mutual agreement between the Employer and the Unions involved." The provision thus constituted a direction to the contracting parties to negotiate further certain terms and conditions of employment which were not expressly spelled out in the contract. Under Article 7 of the contract (R. 10), the chosen instrument of such negotiation was the Joint Conference Committee, composed of representatives of both labor and management. The pre-condition to such negotiation had occurred when Dealers absorbed E & L's secondary authority in the south (R. 39, 42-43, 53, 58). The product of such negotiation was the decision to dovetail the seniority boards of the two companies.

To say, as did the court below, that the agreement of the

parties was not within their power as bargaining representatives "is to ignore a vast body of long-established controlling practices in the process of collective bargaining of which the seniority system . . . is part." *Aeronautical Industrial District Lodge 727* v. *Campbell*, 337 U.S. 521, 527 (1949). "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents . . ." *Steele* v. *Louisville and Nashville R.R.*, 323 U.S. 192, 202 (1944). Decisions of this Court have established the principle that an agreement of the contracting parties looking to the future governance of terms and conditions of employment may not be upset and, in fact, may not be subjected to question by the courts. *Elgin, Joliet, and Eastern R.R. Co.* v. *Burley*, 325 U.S. 711 (1945).

2. None of the grounds relied on by the court below supports its right to review the agreement of the parties in the instant case.

While the court below apparently decided that the parties' power to agree upon dovetailing the seniority of the employees involved was subject to certain "rights of tenure" of the Dealers employees (R. 33), the issue of whether under certain circumstances seniority may "vest" need not be decided by this Court. For in this case, the contract itself makes it clear that whatever seniority "rights" may have accrued to individual employees were necessarily qualified in the event of the absorption of the business of one company by another. In that event, provides the agreement, "the seniority of the employees absorbed or affected thereby shall be determined by mutual agreement between the Employer and the Unions involved." (Art. 4, Sec. 5; R. 10).

Nor would the finding of the court that both "factions" of employees were represented by the same union (R. 32) detract from the power of the contracting parties to agree without judicial interference. One of the facts of life of collective bargaining is that a union must often resolve

opposing interests within a bargaining unit. In so doing, the union is merely performing the required statutory duty of participating with the employer in deciding which employees would sustain the greater disadvantage as a result of employer changes in operation over which the union has no control (*Cf. Pekar* v. *Local 181, Brewery Workers*, 311 F2d 628 (6th Cir. 1962). In these circumstances, so long as no hostile discrimination is practiced, a union may properly participate in making such a decision without judicial interference. *Ford Motor Co.*, v. *Huffman*, 345 U.S. 330, 337-338 (1953).

Nor could the decision of the Committee be criticized on the grounds that "the influence of the Union stood to be enhanced" thereby (R. 32). There is nothing in the record to show any enhancement of the Union's influence or power as a result of the decision. But even if there were a showing of enhanced union influence, it must be deemed as nothing more than a natural consequence of union representation that has been frequently recognized and approved by this Court. "The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group." *J. I. Case Co.* v. *NLRB*, 321 U.S. 332, 338 (1944). The only enhancement of union influence that may be prohibited is that which is accomplished by discrimination. *Local 357, IBT* v. *NLRB*, 365 U.S. 669, 675-676 (1961).

IV

1. Even if the decision of the Joint Conference Committee were viewed as an "arbitration award," the Court below, in holding that said decision was on its merits "erroneous" (R. 31-32), exceeded the permissible bounds of its scope of review under Section 301. As observed by this Court, "it is the arbitrator's construction which was bargained for: and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling

him because their interpretation of the contract is different from his." *United Steelworkers* v. *Enterprise Corp.*, 363 U.S. 593, 599 (1960). Regardless of whether the award pursuant to the grievance procedure is rendered by an arbitrator or a bipartisan committee appointed by the contracting parties, "it is of course not open to the courts to reweigh the merits of the grievance." *Drivers Union* v. *Riss & Co.*, 9 L. Ed. 2d 918, 920 (1963).

2. Even if the decision of the Committee were subjected to a "rule of reason," a long history of practice in labor relations adequately supports its reasonableness. The principle of employee-protection in cases of mergers, absorptions and similar intercompany agreements has become solidified in various congressional enactments. See, Interstate Commerce Act, 49 U.S.C. Secs. 5 (2)(c) and (f), and Sec. 410 (g). The federal courts have consistently upheld decisions of the ICC, the CAB and bipartisan adjustment boards under the Railway Labor Act to dovetail the seniority of employees affected by mergers and other contractual adjustments of their employment status. *U.S.* v. *Lowden*, 308 U.S. 225 (1939); *Railroad Labor Executives Ass'n* v. *U.S.*, 339 U.S. 142 (1950); *Kent* v. *CAB*, 204 F2d 263 (2d Cir. 1953); *Starke* v. *N. Y., Chicago & St. Louis R.R.*, 180 F2d 569 (7th Cir. 1950). In both *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953) and *Aeronautical Industrial District Lodge 727* v. *Campbell*, 337 U.S. 521 (1949), this Court upheld similar contractual adjustments of seniority rights over contentions that such actions were arbitrary and in excess of the bargaining representative's authority.

Accordingly, even if a broader scope of review were permitted than that which has become well established through decisions of this Court, the dovetailing of seniority, which has become a permanent fixture in the national labor scene, may not be held to be unreasonable.

V

In the exercise of both its negotiating and administrative functions as the representative of all employees in the

appropriate unit, the union is limited in power and authority by the duty of fair representation, which requires it—pursuant to Section 9 of the Labor Management Relations Act—to act fairly and honestly in the interests of the employees without hostile, invidious, or irrelevant discrimination. *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953). Although the opinion of the court below intimates that a breach of such duty had occurred in this case (R. 28, 32-33), the complaint did not so allege. (R. 1-8). The most that can be said of the allegations of the complaint is that they obviously constitute statements of conclusion which are not supported by any particular identification of the hostile or irrelevant motive so necessary to a finding that the Union had breached its statutory duty. *Durandetti* v. *Chrysler Corp.*, 195 F. Supp. 653 (E.D. Mich. 1961); *Bailer* v. *Local 470, Teamsters*, 400 Pa. 188, 161 A2d 343 (1960). Additionally, the complaint is defective in that it does not allege that internal union remedies had been exhausted in the case. *Durandetti* v. *Chrysler Corp., supra; Fagan* v. *Pa. R.R.*, 173 F. Supp. 465 (M.D. Pa. 1959). Furthermore, Respondents waived their right to allege "inadequate representation" by failing to address their complaint to the Joint Conference Committee whose procedures they now bring into question. *Livingston* v. *John Wiley & Sons*, 313 F2d 52 (2d Cir. 1963). Finally, the issue of hostile discrimination was not raised in the courts below.

Even if it be assumed that the complaint was sufficient to raise the issue of hostile discrimination and that said issue is otherwise properly before the Court, bad faith motivation may not be found on the facts of this case. The protection of employees about to lose their jobs in an age of chronic and severe unemployment and job displacement affords ample reason for the action taken by the bargaining representative in this and similar cases. Aaron, "Reflections on the Legal Nature and Enforcement of Seniority Rights," 75 Harv. L. Rev. 1532, 1563 (1962); "Wall Street Journal," Vol. CLXII, No. 19, July 26, 1963, pgs. 1, 8. There is no suggestion in this record that the motives

behind the Union's action were not consistent with the readily evident reasons available therefor. As in *Aeronautical Industrial District Lodge 727* v. *Campbell*, 337 U.S. 521 (1949), the Union here evidenced "honest desires for the protection of the interests of all members of the union." Where similar action had been taken in cases coming before this Court, the Court has recognized the validity of its purpose as evidencing "a due regard of union interests which embrace the system of seniority rights." *Campbell, supra*, 337 U.S. 521 at 527; *Ford Motor Co.* v. *Huffman, supra.*

The issue of whether Dealers employees, as a separate entity, enjoyed "representation" before the Detroit Committee is a spurious one. It evolves from the unwarranted assumption that these employees or a separate representative of their choice had the right to appear before the Committee and participate in its decision-making process. The assumption is not supported by law, regardless of whether the Committe's decision is viewed as a grievance award or a negotiated agreement. Dunau, "Employee Participation in the Grievance Aspect of Collective Bargaining," 50 Col. L. Rev. 731, 748 (1950); NLRB General Counsel Adm. Dec., Case No. SR-2364, CCH NLRB ¶ 11, 960 (1962).

Finally, the allegations of the complaint that the Dealers employees were not represented by Paul Priddy at the Detroit hearing; even if taken as true, do not constitute such facts as would be prejudicial to the plaintiffs. There was no reason, on the facts presented, to reject the finding of the trial court in the instant case that "there were three shop stewards from Dealers Transport attending the Detroit meeting, and it would be a matter of idle speculation to assume that the result would have been different had the matter been differently presented." (R. 18-19).

VI

Since as heretofore demonstrated "hostile discrimination" is not in issue before the Court, it is submitted that the Respondents have no legal standing to question the decision rendered under the contract by the Joint Conference Com-

mittee. "The needs of the industrial community would be served best by leaving management and union free to determine by the terms of their collective bargaining agreement what shall be the respective rights of the union and the individual in its administration." Cox, "Rights Under A Labor Agreement," 69 Harv. L. Rev. 601, 618-619 (1956); *Black-Clawson Co., Inc.* v. *Machinists Lodge 355*, 313 F2d 179 (2d Cir. 1962).

The collective bargaining agreement in this case very clearly reserves the decision-making process to the contracting parties, while binding those parties as well as the employees to any resolution emanating from the grievance procedure. (R. 9-12). In the face of such contractual provisions reserving the implementation of the contract to the Union and the Employer alone, suits by individuals attacking the product of the grievance machinery should be excluded from the courts. As pointed out by the Second Circuit Court of Appeals in the *Black-Clawson* case, *supra*, the success of collective bargaining cannot stand impervious to an untrammeled right of individuals to sue. On the other hand, the adoption of the foregoing argument would not leave individual employees bereft of protection for their individual rights. See, *e.g.*, *Ford Motor Co.* v *Huffman*, *supra*; Labor Management Relations Act (29 U.S.C. 141, *et. seq.*), and particularly §9 thereof (*supra*, p. 2); and Labor Management Reporting and Disclosure Act of 1959 (29 U.S.C. 401, *et. seq.*).

ARGUMENT

I

INTRODUCTION

The instant case arises under Section 301 of the Labor Management Relations Act (*supra*, p. 2).

The "only issue" in the case, as presented by plaintiffs below, "is whether or not [the Committee's] decision is in violation of this contract" (R. 55), and its designation by the court below was "simply an action to construe and en-

force a contract.'" (R. 33). See *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448 (1957).

The decision of the Joint Conference Committee does not escape the cognizance of Section 301 simply because "the word 'arbitration' does not appear in the collective bargaining agreement"—"if the award at bar is the parties' chosen instrument for the definitive settlement of grievances under the Agreement it is enforceable under §301." *Drivers Union* v. *Riss & Co.*, 9 L. Ed. 2d 918, 920 (1963).[8] It follows that the state courts had jurisdiction, but were bound to apply federal law. *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238 (1962); *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95 (1962); *Dowd Box Co.* v. *Courtney*, 368 U.S. 502 (1962); *Smith* v. *Evening News Ass'n.*, 371 U.S. 195, 9 L. Ed. 2d 246 (1962). Argument with respect to that aspect of the decision below which involves conflict between state and federal law and raises an issue under the Supremacy Clause of the United States Constitution is presented to the Court in Petitioners' Brief in companion case No. 17 and is adopted by this Petitioner.

Embraced within the Section 301 issue are principles relative to the effect of multi-employer and union bargaining units,[9] the dovetailing of seniority,[10] the union's duty of fair representation,[11] and the relationship of union and individual rights under collective bargaining agreements,[12] all of which, "taken together, shape the national labor policy." *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195 (1962). Undeniably, it is the whole gamut of policies of our national labor laws which constitutes the source of substantive law to be fashioned by the courts under Section

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[8] See also, *Retail Clerks* v. *Lion Dry Goods, Inc.*, 369 U.S. 17 (1962); *Parks* v. *IBEW*, 314 F2d 886, 910 (4th Cir. 1963), cert. den. 372 U.S. 976 (1963) ("Submission to the Council is not classical arbitration, but resembles it sufficiently to fall within the ambit of [Section 301] policy").

[9] *E.g.*, *NLRB* v. *Truck Drivers Local 449*, 353 U.S. 87 (1957).

[10] *E.g.*, *U.S.* v. *Lowden*, 308 U.S. 225 (1939).

[11] *E.g.*, *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953).

[12] *E.g.*, *J. I. Case Co.* v. *NLRB*, 321 U.S. 332 (1944).

301. *TWU* v. *Lincoln Mills, supra.*

Also pervasive to the controversy is the following conceptual dichotomy: If the Joint Conference Committee were viewed simply as the final step in the grievance machinery and the submitted dispute as a "grievance," the case is one designed to avoid an "award" in the classical setting of "arbitration;" [13] if, on the other hand, the bipartisan Committee constitutes an extension of the negotiating arms of the parties to the contract, and the submission a call to action by the bargaining representatives to implement an open-ended seniority provision, the case may be viewed as seeking to avoid the consequences of an agreement newly negotiated by the contracting parties.[14]

Upon either view, the principles of Section 301 and other national policies above-described must be brought to bear and the decision of the Committee must be upheld.

II

THE COURT BELOW WAS IN ERROR IN HOLDING THAT THE DISPUTE WAS NOT PROPERLY BEFORE THE COMMITTEE, THE COURT HAVING SUBSTITUTED ITS OWN INTERPRETATION OF ARTICLE 4, SECTION 5 AND ITS OWN VIEW AS TO THE SCOPE AND COVERAGE OF THE MULTI-EMPLOYER, MULTI-LOCAL UNION COLLECTIVE BARGAINING AGREEMENT FOR THE INTERPRETATION OF THE COMMITTEE.

1. The abiding principle governing the settlement of contractual disputes was stated by Congress with its enactment of the Labor Management Relations Act (Section 203(d)):

> Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for

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[13] *Cf. United Steelworkers* v. *Enterprise Corp.*, 363 U.S. 593 (1960) with *Drivers Union* v. *Riss & Co., supra.*

[14] *Ford Motor Co.* v *Huffman*, 345 U.S. 330 (1953); *Aeronautical Industrial Dist. Lodge 727* v. *Campbell*, 337 U.S. 521 (1949).

> settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement. . . .

"That policy," in the words of this Court, "can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play." *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 566 (1960). Accordingly, when the parties have agreed upon a method for the settlement of disputes and agreed further to utilize the prescribed method for the resolution of all such disputes, the courts have been admonished not to interfere:

> The function of the court . . . . is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. . . . The courts, therefore, have no business weighing the merits of the grievance. . . .[15]

The rule which restricts participation by the courts and permits discretion to the contracting parties has ample foundation in reason:

> Within the interstices [of the contract], familiarity with the parties' way of life and general industrial practice is essential to sound interpretation. A written instrument must be read with the eyes of those to whom it is addressed. The inclusion of an arbitration clause shows a desire to commit such questions to a tribunal with the specialized knowledge and experience necessary to perceive the substance which lies beyond dictionary definitions; this may be implicit in the collocation of ideas even though there is no single phrase or sentence in which it finds expression. And surely no collective agreement contemplates elaborate proof of its industrial context first in the suit to compel arbitration and later in arbitration.[16]

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[15] *United Steelworkers* v. *American Mfg. Co., supra,* at 568; See also *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *Drivers Union* v. *Riss & Co.*, 9 L. Ed. 2d 918, 920 (1963).

[16] Cox, "Reflections Upon Labor Arbitration," 72 Harv. L. Rev. 1482, 1515 (1959).

The desire of the parties was, in this case, expressed with unusual force and clarity. The parties agreed to submit "any controversy" over the employees' standing on seniority lists "to the joint grievance procedure." (R. 9; Art. 4, §1). They further agreed to desist from using "self-help" methods "without first using all possible means of a settlement, as provided for in this Agreement, of any controversy which might arise." (R. 11; Art. 7, §1). "All matters pertaining to the interpretation of any provision . . . must be submitted to the . . . Joint Conference Committee" (R. 12; Art. 7 §2(d)), whose decision "shall be final and conclusive and binding upon the Employer and the Union, and the employees involved." (R. 12; Art. 7, §2(e)). The stated intention of the parties was "to resolve all questions of interpretation by mutual agreement." (R. 13; Art. 7, §2(f)). The substantive provision of the contract invoked by the grievants, Article 4, Section 5 (R. 10), provided that in the event of absorption or merger as between two companies "the seniority of the employees absorbed or affected thereby shall be determined by mutual agreement between the employer and the Unions involved." It further directed that "any controversy with respect to such matter shall be submitted to the joint grievance procedure." Manifestly, the agreement of the parties was to submit to the Joint Committee all grievances and questions of interpretation arising under their contract, "not merely those that a court may deem to be meritorious." *United Steelworkers* v. *American Mfg. Co., supra*, at 567.

In the eyes of the state court, the dispute was not properly before the Joint Conference Committee because "we cannot find any such meaning" in Article 4, Section 5, as attributed to it by the Committee (R. 31). The court read the provision as conditioning the parties' consideration of the seniority problem upon the assumed choice of the absorbing employer to employ or reject the employees of the absorbed company. (R. 31). However, the phrase "the seniority of the employees absorbed . . . thereby" arguably implies that the absorbing employer must absorb the em-

ployees as well. Even if that were not so, the provision plainly applies by virtue of the phrase "affected thereby," and only disregard of those words can justify the interpretation of the court below. At the very least, it is plain that the Joint Conference Committee had before it "a claim which on its face is governed by the contract." *United Steelworkers* v. *American Mfg. Co., supra,* at 568. It was not in the province of the court to go beyond this point and determine "arbitrability" on the basis of its own, independent interpretation of the substantive contractual provision invoked by the parties.

2. The position of the state court that the Dealers and E & L employees were covered by separate and independent contracts, one without effect upon the other, is subject to the same criticism. The scope of coverage of a collective bargaining agreement is a matter of interpretation for the "tribunal" chosen by the parties, to the same extent as are the substantive provisions thereof, with but one question reserved to the court—whether the asserted claim is "on its face" governed by the contract.[17] The number of parties asserting rights under a contract has never been thought to be of moment if agreement had been reached to settle inter-party disputes by a particular method agreeable to all. *Retail Clerks* v. *Lion Dry Goods Inc., supra; Holman* v. *Industrial Stamping Co.,* 344 Mich. 235 (1955); *Parks* v. *IBEW,* 314 F2d 886 (4th Cir. 1963), cert. den. 372 U.S. 976 (1963). Whether that method was intended to embrace a certain party or a particular group of employees in a given dispute is a question within the special competence of the contracting parties. For what to the Union and the employer may be a "familiar interplay of reliance upon the literal terms of the contested standard, its place in the con-

[17] *United Steelworkers* v. *American Mfg. Co., supra,* at 567; *Livingston* v. *Wiley & Sons,* 313 F2d 52, 57 (2d Cir. 1963): "We cannot say that it was intended that this consolidation should preclude this Union from proceeding to arbitration to determine the effect of the consolidation on the contract and on the rights of the employees arising under the contract."

tractual scheme, the objective it is designed to serve, the consequences of differing results, and the plant and industry usage," [18] to many courts an enigmatic wonderland. For that reason the question before the court below was not whether the various parties involved comprised "one big happy family" (R. 31), but whether it may be fairly argued that they had agreed to live together under the same contractual "tent."

Plainly they had so agreed. The basic contract was negotiated on behalf of the several local unions by the National Conference, and on behalf of the several employers by the Automobile Transporters Labor Division (R. 8-14, 39, 51-52). Both Dealers and E & L are parties to the contract, having signed separate copies thereof (R. 51-52). Each agreed to recognize the National Conference, on behalf of its member locals, as the exclusive representative of all employees involved (R. 9; Art. 1, §1). Each expressly agreed "to become a part of the multi-employer unit set forth in the Agreement." (R. 13; Art. 38). Of course, the same substantive provisions and grievance procedure are applicable to all employees. This results in a multi-employer, multi-local union, multi-state bargaining unit which receives recognition and sanction under the National Labor Relations Act. *Motor Cargo, Inc.*, 108 NLRB 716. It has been said that the Act "exemplifies the faith of Congress in free collective bargaining between employers and their employees when conducted by freely and fairly chosen representatives of *appropriate units of employees.*" *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 337 (1953) (emphasis supplied). The type of "appropriate" unit in effect here "long antedated the Wagner Act." *NLRB* v. *Truck Drivers Local 449*, 353 U.S. 87, 94 (1957). As of 1957, four million employees "were governed by collective bargaining agreements signed by un-

[18] Dunau, "Employee Participation in the Grievance Aspect of Collective Bargaining," 50 Col. L. Rev. 731 (1950).

ions with thousands of employer associations."[19] Bills introduced in Congress to outlaw the multi-employer unit have been defeated by "a storm of protest that their adoption would tend to weaken and not strengthen the the process of collective bargaining and would conflict with the national labor policy of promoting industrial peace through effective collective bargaining." *NLRB* v. *Truck Drivers Local 449, supra,* at 95.

"The fact that the results of joint negotiation have been incorporated in separate uniform contracts" which have been separately signed by the individual parties is entirely consistent with the existence and effectiveness of the multi-employer unit. *Balaban & Katz,* 87 NLRB 1071. Once the unit is formed, the right of withdrawal therefrom is carefully circumscribed lest damage be done to the national policy of "fostering and maintaining stability in bargaining relationships." *Retail Associates, Inc.,* 120 NLRB 388 (1958); *Donaldson Sales, Inc.,* 141 NLRB No. 116 (1963). Any economic pressure exerted by private parties which "threatens the destruction of the employers' interest in bargaining on a group basis," may legitimately be met with similar, countervailing action (*NLRB* v. *Truck Drivers Local 449, supra*), and may in fact run afoul of the Act. *Bricklayers Union (Builders Institute),* 142 NLRB No. 14 (1963). The purpose of bargaining on that basis is not only to permit equalization of power between labor and management, but to assure that all employees within a certain area or industry work under the same rates, working conditions, rights and obligations so as to minimize threats to peaceful relations in the area or industry involved and to remove labor costs from competition. *Cf.*

[19] *NLRB* v. *Truck Drivers Local 449, supra,* at 95. The following notation appears in Summers, "Collective Power and Individual Rights in the Collective Agreement—A Comparison of Swedish and American Law," 72 Yale L. J. 421, note 1 (1963): "Nearly 40% of all workers covered by collective agreements are in multi-employer systems . . . Multiple-employer bargaining is particularly dominant in the Clothing, Construction, Coal Mining, Hotel and Transportation industries. . . ."

American Steel Foundaries v. *Tri-City Central States Council*, 257 U.S. 184 (1921); *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469 (1940); *U.S.* v. *Hutcheson*, 312 U.S. 219 (1941). The federal policy holding that by the contractual establishment of a multi-party bargaining unit the parties "have demonstrated their desire to be bound by group rather than individual action"[20] negates both the assertion of the state court that the E & L employees were "strangers to the Dealers contract" and its underlying assumption that "separate agreements" were in effect. (R. 31).

If this arrangement were not to the liking of the state court, the national labor policy cautioned against interference, for it was not for the court to "cure whatever deficiencies (it) may think exist in the pattern the parties have fashioned," or "to remake the contract by introducing even salutary provisions not legislatively prescribed or necessarily implied." *Parks* v. *IBEW*, 314 F2d 886, 907, 917 (4th Cir. 1963), cert. den. 372 U.S. 976 (1963). Particularly is this true where, as here, the conclusion of the court had the effect of fragmentizing a bargaining unit favored by the Act and debilitating the undeniable discretion of the bargaining representatives to determine for themselves "the unit within which seniority is to be computed." *Ford Motor Co.* v. *Huffman*, *supra*, at 338-339.

III

SINCE THE DECISION OF THE JOINT CONFERENCE COMMITTEE CONSTITUTED A NEGOTIATED AGREEMENT BETWEEN THE CONTRACTING PARTIES, IT WAS NOT SUBJECT TO JUDICIAL REVIEW ON ITS MERITS.

If, as urged in Argument II, *supra*, the issue of seniority was properly before the Joint Conference Committee, the resulting determination—constituting a negotiated agreement between the contracting parties—was not subject to judicial review.

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[20] *Balaban & Katz*, *supra*, at 1073

A. Agreement of Contracting Parties Not Reviewable

Article 4, Section 5, which formed the basis of the determination of the Joint Conference Committee (R. 10), states that "in the event" of the absorption of one business into another, "the seniority of the employees absorbed or affected thereby *shall be determined by mutual agreement* between the Employer and the Unions involved." (emphasis supplied). Here is a direction to further negotiation of terms and conditions of employment not expressly spelled out in the contract. The chosen instrument for such negotiation was the Joint Conference Committee whose decision is now in dispute—"Any controversy with respect to such matter shall be submitted to the joint grievance procedure (Article 7)." (R. 10). The precondition to such negotiation had occured in this case; Dealers had absorbed E & L's "secondary authority" in the South (R. 39, 42-43, 53). That an absorption had taken place was frankly admitted by Dealers (R. 44, 58). The question of the seniority status of the employees "affected thereby" was resolved by negotiation between the parties, as members of the Joint Conference Committee, pursuant to the direction of Article 4, Section 5 and Article 7. The product of such negotiation was the agreement to dovetail the seniority boards of the two companies (R. 3-4, 59-60).

That the process invoked was one of negotiation is not open to serious doubt. The contract provision relied on did "little more than leave problems to future consideration with an expression of hope and good faith."[21] The nature of such provisions was aptly explained by Professor Cox:

> Many provisions do little but establish the framework for further bargaining. Others have a generality which obviously looks to joint labor-management particularization. Deliberate ambiguities, inadvertent omissions, and unforeseen contingencies require continual rule making which, passing in the guise of interpretation, parallels

[21] Shulman, "Reason, Contract, and Law in Labor Relations," 68 Harv. L. Rev. 999, 1005 (1955).

the law making of courts and administrative agencies.[22]

In the process of "legislation" of *its future* conditions, as distinguished from the "administration" of existing conditions,

> there are no agreed criteria against which each side may evaluate the claims of the other or justify its own. To the support of their positions both bring a combination of pressure and persuasion, and out of the resulting interchange an area of accord is reached for the future governance of the employment relationship.[23]

The fact that the legislation effected in this case used as its vehicle the regular grievance procedure does not detract from its essential character. For it is generally recognized that "both the negotiation of a new employment standard and the administration of an existing one may be effected through the grievance machinery that is almost invariably established by agreement."[24] Nor is the argument disturbed by reason of the fact that the negotiative process took place in the midst of a contract term. This Court has, on numerous occasions and in varying situations, expressed its belief that collective bargaining "is a continuous process . . . [N]either the conditions to which it addresses itself nor the benefits to be secured by it remain static." *Aeronautical Industrial Dist. Lodge 727* v. *Campbell*, 337 U.S. 521, 525 (1949).

Thus the parties to the contract in this case have agreed upon a solution which is "the product of the exercise of federally sanctioned collective bargaining rights." *Teamsters Union* v. *Oliver*, 358 U.S. 283, 289, 297 (1959). The agreement negotiated by the Union "binds the individual worker even though both he and his employer might prefer a different ararngement."[25] To say that the Union's action was dehors its power "is to ignore a vast body of long-establ-

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[22] Cox, "Rights Under a Labor Agreement," 69 Harv. L. Rev. 601, 606 (1956).

[23] Dunau, "Employee Participation in the Grievance Aspect of Collective Bargaining," 50 Col. L. Rev. 731, 732 (1950).

[24] *Ibid.*, at 733.

[25] Cox, "Individual Enforcement of Collective Bargaining Agreements," 8 Lab. L. J. 850 (1957); see also *J. I. Case Co.* v. *NLRB*, 321 U.S. 332 (1944).

ished controlling practices in the process of collective bargaining of which the seniority system . . . is part." *Aeronautical Industrial Dist. Lodge 727* v. *Campbell, supra,* at 527. A recent example of these "controlling practices" was demonstrated in *Hildreth* v. *Union News Co.,* 315 F2d 548 (6th Cir. 1963). There the court held that "the Union was the exclusive representative of all the employees in the unit involved for the purposes of collective bargaining, and that such statutory power, in combination with the terms of the bargaining contract, authorized the Union and the [company] to mutually conclude, as a part of the bargaining process," that a certain employee should be discharged for good cause. (at 550). The issue there, as stated by that court, was the same as the issue here—"whether, under the circumstances here involved, the Union had the authority, acting in the collective interest of those whom it represented, to agree with the defendant [company] on necessary corrective measures to be taken without such action being treated as a breach of the collective bargaining agreement." (at 551). The answer of the court was that "such authority existed and was properly exercised." (at 551). For a further recent application of the foregoing principle, see *Giordano* v. *Mack Trucks, Inc.,* 203 F. Supp. 905 (D. N. J. 1962).

"Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents . . ." *Steele* v. *Louisville & Nashville R.R.,* 323 U.S. 192, 202 (1944). In *Elgin, Joliet & Eastern R.R.* v. *Burley,* 325 U.S. 711, 739 (1945), this Court made clear the insulation from attack of union privilege to effectuate agreements looking to the future governance of terms and conditions of employment:

> To settle for the future alone, without reference to or effect upon the past, is in fact to bargain collectively, that is, to make a collective agreement. . . . It includes the power to make a new agreement settling for the future a dispute concerning the coverage or meaning of a pre-existing collective agreement.

It is within those established boundaries that the Union

and the Employer rendered their decision in the instant case. "Unless such bilateral decisions, made in good faith and after unhurried consideration between a Union and an employer, be sustained in court, the bargaining process is a mirage, without the efficacy contemplated by the philosophy of the law which makes its use compulsory." *Union News Co.* v. *Hildreth*, 295 F2d 658, 664 (6th Cir. 1961).

B. Grounds Relied On By Court Below.

None of the grounds relied on by the court below supports its right to review the agreement of the parties in the instant case.

1. The "Rights of Tenure" Theory.

While the court below apparently decided that the parties' power to agree upon dovetailing the seniority of the employees involved was subject to certain "rights of tenure" or "vested" rights of the Dealers employees respecting seniority (R. 33),[26] that issue need not be decided by this Court. For the contract in this case, on its face, qualified whatever seniority "rights" had accrued to individual employees by providing that in the event of absorption of the business of one company by another "the seniority of the employees absorbed or affected thereby shall be determined by mutual agreement between the Employer and the Unions involved." (Art. 4, §5, R. 10). As previously noted, it was pursuant to that provision that the parties agreed to dovetail seniority.

2. Same Representative for Two Factions.

Nor does the fact that both "factions" of employees were represented by the same union (R. 32), detract from the power of the contracting parties to agree without judicial interference. One of the facts of life of collective bargain-

[26] But see, *contra*, *Aeronautical Industrial Dist. Lodge, 727* v. *Campbell, supra; Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953); *NLRB* v. *Wheland Co.*, 271 F2d 122 (6th Cir. 1959); *Falsetti* v. *Local 2026, United Mineworkers*, 46 LRRM 2389, 161 A2d 882 (Pa. S. Ct. 1960); *Holman* v. *Industrial Stamping Co.*, 344 Mich. 235, 37 LRRM 2274 (1955); Aaron, "Reflections on the Legal Nature and Enforcement of Seniority Rights," 75 Harv. L. Rev. 1532 (1962).

ing is that a union must often resolve opposing interests within a bargaining unit. Especially is this so where, as here, a merger is effected which seriously jeopardizes the seniority of a substantial number of employees represented by the union. While in such cases the union is often blamed by the adversely affected group for having caused its injury, the union is merely performing the required statutory duty of participating with the employer in deciding which employees would sustain the greater disadvantage as a result of employer changes in operation over which the union has no control.[27] And, in these circumstances, so long as no hostile discrimination is shown, a union may properly participate in making such a decision without judicial interference. This was precisely the view expressed by this Court in *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 337-338 (1953):

> Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected.
>
> * * * * *
>
> Any authority to negotiate derives its principal strength from a delegation to the negotiators of a discretion to make such concessions and accept such advantages as, in the light of all relevant considerations, they believe will best serve the interests of the parties represented. (345 U.S. at 337-338).[28]

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[27] It is not at all unlikely that if, in the instant case, the Joint Committee's decision had favored the Dealer's employees, the E & L employees would have instituted a similar suit. It is interesting to note that the exact reverse of this case occurred in *Pekar* v. *Local 181, Brewery Workers*, 311 F2d 628 (6th Cir. 1962). There the employees of a recently closed plant of a company asked the union to process a grievance whereby their seniority would be dovetailed with that of the employees in a still-open plant. The union refused, and the employees sued. The court, however, declined the invitation to question the exercise of the union's discretion.

[28] For similar expressions of view, see *NLRB* v. *Wheland Co.*, 271 F2d 122 (6th Cir. 1959); *O'Donnell* v. *Pabst Brewing Co.*, 107 NW

The commentators in the field have recognized that a requirement that all collective decisions be equally balanced in their effect upon the various groups of employees involved would not only be an impossibility but a serious detriment to the essential freedom and flexibility of the collective bargaining process.

> In negotiating seniority provisions . . . the union is permitted a considerable latitude of discretion . . . it may propose or agree to changes in existing seniority rights that are adverse and detrimental to the interests of some of the employees affected. The same generally is true in respect to administration of a seniority system . . .[29]

Professor Cox has pointed out that group interests "may conflict with the claims of individuals because several classes of individuals have divergent interests, because the demands of group organization and coherence clash with individual self-interest, or even because the union officialdom is not immediately responsive to the wishes of a numerical majority of the members."[30] The function of the union in such circumstances was explained by Professor Cox in the following terms:

> When the interests of several groups conflict or future needs run contrary to present desires or when the individual's claim endangers group interests, the union's function is to resolve the competition by reaching an accommodation or striking a balance. The process is political. It involves a melange of power, numerical strength, mutual aid, reason, prejudice and emotion. Limits must be placed on the authority of the group but within the zone of fairness and rationality this method of self-gov-

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2d 484, 47 LRRM 2554 (Wis. S. Ct. 1961); *Parks* v. *IBEW*, 314 F2d 886 (4th Cir. 1963), cert. den. 372 U.S. 976 (1963); *Pekar* v. *Local 181, Brewery Workers*, 311 F2d 628 (6th Cir. 1962); *Holman* v. *Industrial Stamping Co.*, 344 Mich. 235 (1955); *Cf. Grand Lodge* v. *Girard Lodge*, 384 Pa. 248, 120 A 2d 523, 528 (1956): "[W]hen there are only five apples for six people, it is impossible for each person to receive a whole apple."

[29] Aaron, *supra*, note 26, at 1536.

[30] Cox, *supra*, note 22, at 604.

ernment probably works better than the edicts of any outside arbiter."[31]

3. Enhancement of Union Influence.

The court below was critical of the Joint Committee decision because "the influence of the union stood to be enhanced" thereby (R. 32). There is nothing in the record to support that conclusion. The enhanced power or influence of the Union as a result of a decision to dovetail seniority is, therefore, a matter of speculation; but in varying degrees it may be the inevitable product of the collective bargaining process. When a favorable agreement is signed, whereby the employer relinquishes his formerly absolute power and permits the union to share in the decision making process, the union's power is perforce enhanced in direct proportion to the degree and kinds of power yielded by the employer. The same holds true as to each definable area of conditions of employment embodied in the agreement. It is particularly true in the case of seniority, for that concept, as such, is first born in the collective agreement. The power which is in that manner committed to the union by the effectuation of the agreement thereafter grows or diminishes, in turn, depending on the degree of effectiveness with which the contract is administered and new agreements are negotiated by the bargaining agent. As stated by Professor Aaron:

> [E]very seniority provision reduces, to a greater or lesser degree, the employer's control over the work force and compels the union to participate to a corresponding degree in the administration of the system of employment preferences which pits the interests of each worker against those of all the others."[32]

Not only is there no way to avoid this phenomenon, given the present system of collective bargaining, but the avoidance thereof is not a desirable end to pursue if the system is to remain workable. For "the very purpose of providing

[31] Cox, *supra*, note 25, at 856.

[32] Aaron, *supra*, note 26, at 1534-1535.

by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group." *J. I. Case Co.* v. *NLRB*, 321 U.S. 332, 338 (1944). As stated by this Court in *Local 357, I.B.T.* v. *NLRB*, 365 U.S. 667, 675-676 (1961):

> When a union engages in collective bargaining and obtains increased wages and improved working conditions, its prestige doubtless rises and, one may assume, more workers are drawn to it. When a union negotiates collective bargaining agreements that include arbitration clauses and supervises the functioning of those provisions so as to get equitable adjustments of grievances, union membership may also be encouraged. The truth is that the union is a service agency that probably encourages membership whenever it does its job well. But, as we said in Radio Officers' Union, C.T.U. v. NLRB (US) supra, the only encouragement or discouragement of union membership banned by the Act is that which is 'accomplished by discrimination.'

Thus, the decision of the court below, on any of the above grounds, could only be sustained by a drastic alteration of federal law and practice that has maintained the vitality of the collective bargaining process for some 28 years.

IV

THE COURT BELOW ERRED IN SETTING ASIDE THE DECISION OF THE COMMITTEE ON THE GROUND THAT, IN ITS VIEW OF THE MERITS OF THE DISPUTE, THE DECISION WAS ERRONEOUS.

1. Even if the decision of the Joint Conference Committee could not be viewed as an agreement of the contracting parties made pursuant to negotiation, but is seen solely as the product of the parties' function of administering the contract through the grievance procedure, the court below, in holding that said decision was on its merits "erroneous" (R. 31-32), exceeded the permissible bounds of its scope of review under Section 301. Unless judicial review of a deci-

sion already rendered were subjected to the same stringent limitations as applied to questions of arbitrability, the "favored method of resolving industrial disputes would atrophy for non-use." *Farris* v. *Alaska Airlines, Inc.*, 116 F. Supp. 907, 908 (W.D. Wash. 1953). This Court has therefore observed that "it is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." *United Steelworkers* v. *Enterprise Corp.*, 363 U.S. 593, 599 (1960); See, also, *Local 453, IUE* v. *Otis Elevator Co.*, 314 F2d 25 (2d Cir. 1963). Here it was the Committee's construction "which was bargained for," received, and accepted by the parties until the wrongful intervention of the court below deprived them of their bargain.

In *Drivers Union* v. *Riss & Co.*, 9 L. Ed. 2d 918 (1963), this Court had before it a decision of the Sixth Circuit, setting aside an award rendered by a joint committee similar in composition to the Committee in this case pursuant to an agreement then in effect between petitioner here and an employer, on the grounds *inter alia*, that the award was not an "arbitration award" and was, in any event, erroneous on its merits. That decision was reversed, this Court concluding as follows:

> [I]f the award at bar is the parties' chosen instrument for the definitive settlement of grievances under the Agreement it is enforceable under § 301. And if the Joint Area Cartage Committee's award is thus enforceable, *it is of course not open to the courts to reweigh the merits of the grievance.* (at p. 920) (emphasis supplied).

The holding in *Riss* must, therefore, be deemed dispositive of the instant issue.

2. Even if the decision of the Joint Conference Committee were subject to the "rule of reason," a long history of practice in labor relations constitutes eloquent testimony to the fact that the solution arrived at by the Committee was neither unreasonable, novel nor revolutionary in any

sense. The contract provision relied on by the grievants and by the Committee is a familiar instrument of collective bargaining:

> Seniority rights also can be designed to protect employees against the loss of their employment preferences under specific anticipated contingencies. Provisions covering such subjects as interplant transfers, mergers, or acquisition of new facilities are not uncommon.[33]

The principle of employee-protection in the case of mergers, absorptions and like inter-company arrangements has become too solidified through the course of congressional enactments and court decisions to permit question. The Interstate Commerce Act, for example, provides express protection to employees of motor carriers and railroads (49 U.S.C. §§5(2)(c) and (f)). With respect to motor carriers, §5(2)(c) provides that in "passing upon any proposed transaction . . . the Commission shall give weight to . . . the interest of the carrier employees affected." As to carriers by railroad, §5(2)(f) states that as "a condition of its approval . . . of any transaction . . . the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected," and that its order shall include "conditions providing that during the period of four years from the effective date of such order, such transaction will not result in employees . . . affected by such order being in a worse position with respect to their employment. . . ." The concern of Congress was illustrated by the addition of §410 (g) to the aforementioned Act in 1942 to assure protection to employees of freight forwarders:

> Provided, however, that if the proposed transfer would affect the interests of employees of a freight forwarder, the Commission shall require as a prerequisite thereto, a fair and equitable arrangement to protect the interests of the employees affected.

The federal courts have consistently sanctioned decisions

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[33] Aaron, "Reflections on the Legal Nature and Enforcement of Seniority Rights," 75 Harv. L. Rev. 1532, 1542 (1962).

of the ICC,[34] the CAB [35] and bipartisan adjustment boards under the Railway Labor Act [36] to dovetail the seniority of employees affected by mergers and other contractual adjustments of their employment status. In both *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953) and *Aeronautical Industrial Dist. Lodge 727* v. *Campbell*, 337 U.S. 521 (1949), this Court upheld similar contractual adjustments of seniority rights over contentions that such contracts were "arbitrary" and that the bargaining representative exceeded its authority by so contracting. See also, *Hardcastle* v. *Western Greyhound Lines*, 303 F2d 182 (9th Cir. 1962); *NLRB* v. *Wheland Co.*, 271 F2d 122 (6th Cir. 1959); *Pratt* v. *Wilson Trucking Co.*, 214 Ga. 385 (1958); *O'Donnell* v. *Pabst Brewing Co.*, 107 NW 2d 484, 47 LRRM 2554 (Wis. S. Ct. 1961). More recently, the General Counsel of the National Labor Relations Board refused to issue complaint upon the allegation that the dovetailing of seniority was discriminatory. Adm. Dec. of Gen. Counsel, Case No. SR-1973, CCH NLRB ¶11, 305 (May 17, 1962). In that case, the contract between a union and two common carriers specified that in the event

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[34] *U.S.* v. *Lowden*, 308 U.S. 225 (1939); *Railroad Labor Executive Ass'n.* v. *U.S.*, 339 U.S. 142 (1950). The original *Lowden* case before the I.C.C. was resolved only after "counsel for the applicants . . . stated that they are willing to 'dovetail' the seniority lists [of the two carriers involved]." *C.R.I. and G. Trustees Lease*, 230 I.C.C. 181, 187. In *Hall's Motor Transit Co.—Control and Merger—Buck Express, Inc.*, No. MC-F-7593, the examiner stated that "dovetailing employees is an equitable solution to the seniority problem concommittant to the unification." (unpublished; decision effective May 23, 1961).

[35] *Kent* v. *CAB*, 204 F2d 263 (2d Cir. 1953). In the recent "United-Capitol Merger Case," the CAB approved the merger subject to the following protection: "Insofar as the merger affects the seniority rights of the carriers' employees, provisions shall be be made for the integration of seniority lists in a fair and equitable manner, including, where applicable, agreement through collective bargaining between the carriers and the representatives of the employees affected." (Docket 11699, App. A, p. 1, April 3, 1961).

[36] *Starke* v. *N. Y., Chicago & St. Louis R.R.*, 180 F2d 569 (7th Cir. 1950); *Fagan* v. *Pa. R.R.*, 173 F. Supp. 465 (M.D. Pa. 1959).

of a purchase by one of the other the seniority lists of the two groups of employees would be dovetailed. Upon the occurrence of the specified event and the implementation of the provision, the effort to set it aside at the hands of the Board was unsuccessful.

The dovetailing of seniority, and similar devices of employee-protection, have indeed become a permanent fixture in the national labor scene.

V

THE DECISION BELOW WAS LIKEWISE INCONSISTENT WITH FEDERAL LAW INSOFAR AS IT IMPLIED A BREACH OF THE UNION'S DUTY OF FAIR REPRESENTATION.

In the exercise of both its negotiating and administrative functions as the representative of all employees in the appropriate unit, the Union is limited in power and authority by the duty of fair representation, which requires it —pursuant to § 9 of the Labor Management Relations Act —to act fairly and honestly in the interests of the employees without hostile, invidious or irrelevant discrimination. *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953); *Aeronautical Industrial Dist. Lodge 727* v. *Campbell*, 337 U.S. 521 (1949); *Steele* v. *Louisville and Nashville R.R.*, 323 U.S. 192 (1944); *Tunstall* v. *Brotherhood of Locomotive F & E*, 323 U.S. 41 (1957); *Conley* v. *Gibson*, 355 U.S. 41 (1957). Although the opinion of the court below intimates that a breach of such duty had occurred in this case (R. 28, 32-33), the complaint did not so allege (R. 1-8). The complaint states that the Dealers employees had "relied on . . . the integrity and fairness of Local 89 and the International . . . to take care of their interest in said grievance" (R. 3), that Paul Priddy, president of the Local, deceived the plaintiffs and "left them without representation before the . . . Committee" (R. 3); that the Committee's decision was "contrived" by the Local and the power of the International was used against the Dealers employees (R. 4-5);

and that the Union "has deceived and failed completely to represent said employees." (R. 5). The foregoing are very obviously statements of conclusion which are not supported by a particular identification of the "hostile" or "irrelevant" motive so necessary to a finding that the Union had breached its statutory duty. *Bailer* v. *Local 470, IBT,* 400 Pa. 188, 161 A2d 343 (1960); *Hot Shoppes, Inc.* v. *McNamara,* 52 LRRM 2196 (N.Y.S. Ct. 1963); *O'Donnell* v. *Pabst Brewing Co.,* 107 NW 2d 484, 47 LRRM 2554 (Wis. S. Ct. 1961). Allegations strikingly similar to those made in the instant case were before the court in *Durandetti* v. *Chrysler Corp.,* 195 F. Supp. 653 (E. D. Mich. 1961), and were found insufficient for the following reasons:

> The alleged misrepresentations by Local 227 officials and Chrysler to the plaintiffs regarding the retention of seniority rights by temporary transferees to Trenton, even if true, and the alleged refusal of Sumeracki to process the grievances do not indicate any "hostile discrimination."
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> The plaintiffs have, at best, stated a cause of action containing a mixture of unfair labor practices, violation of seniority rights, or breach of contract, none of which indicate "hostile discrimination" or differences based upon "irrelevant" and "invidious" factors, See *Berman* v. *National Maritime Union,* 166 F. Supp. 327, 332, 43 LRRM 2209 (S.D. N.Y. 1958).

The complaint in this case suffers the same fatal defect. Additionally, causes of action based on the theory of "hostile discrimination" are subject to the precondition that plaintiff's grievance against his union be first explored through available internal union remedies. *Hot Shoppes, Inc.* v. *McNamara,* 52 LRRM 2196 (N.Y. S.Ct. 1963); *Fagan* v. *Pa. R.R.,* 173 F. Supp. 465 (M.D. Pa. 1959); *Durandetti* v. *Chrysler Corp.,* 195 F. Supp. 653 (E. D. Mich. 1961). The complaint in this case does not allege that such remedies had been exhausted; nor was there a showing that an attempt had been made to explore that avenue of relief.

Furthermore, if Dealers employees felt inadequately represented before the Detroit Committee, their complaint

should have been addressed by the Dealers shop stewards to the Committee in Detroit. The majority of courts and commentators have taken the position that questions of procedure in cases of "arbitration" are within the jurisdictional realm of the arbitrator and not the courts. *RCA* v. *Ass'n of Professional Engineering Personnel*, 291 F2d 105, 48 LRRM 2270 (3d Cir. 1961); *IAM* v. *Hayes Corp.*, 296 F2d 238, 49 LRRM 2210 (5th Cir. 1961); *Livingston* v. *John Wiley & Sons*, 313 F2d 52, 52 LRRM 2223 (2d Cir. 1963), and authorities cited in notes 6, 7 and 8. As stated by the Second Circuit Court of Appeals in *Livingston*, *supra*, a contrary result "would open the door wide to all sorts of technical obstructionism." (313 F2d at 63). "There is nothing startling about this distribution of power"[1]—court actions challenging decisions of administrative agencies have traditionally proceeded upon the hypothesis that all available issues of law and procedure had been presented, at the first instance, to the agency and that thereby all recourse to administrative relief had been exhausted." The Record in this case, however, demonstrates that the Dealers shop stewards were given every opportunity to state their position, that they did in fact do so, and that they made no contention before the Committee as to their "inadequate representation." (R. 37-40, 51). Under these circumstances, the question of "due process" before the Committee must be held to have been waived by Respondents. *Local 149, Automobile Workers* v. *American Brake Shoe Co.*, 45 LRRM 2437, 2440 (W.D. Va. 1959), aff. 285 F2d 869; *Farris* v. *Alaska Airlines, Inc.*, 113 F. Supp. 907, 32 LRRM 2547, 2549 (W.D. Wash. 1953). Finally, the issue of hostile discrimination was not raised below. Plaintiffs stated, "our only issue is whether or not their [the Committee's] decision is in violation of this contract" (R. 55) and the court below designated the case as "simply an action to construe and enforce a contract." (R. 33).

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[1] Cox, "Reflections Upon Labor Aribitration," 72 Harv. L. Rev. 1482, 1509, at notes 76 and 77 (1959).

Even if it be assumed that the complaint were sufficient and the issue properly before the Court, bad faith motivation may not be found on the facts of this case. No element of arbitrariness or hostile discrimination may be said to inhere in the Committee's decision to dovetail seniority (*supra*, pp. 37-40). The decision was arrived at through the process of negotiation between the parties to the contract, pursuant to a contractual provision expressly calling for such negotiation at the hands of the Joint Conference Committee (Article 4, §5; R. 10). "Most authorities have distinguished rather sharply between the nature of the union's duty of fair representation in negotiating a collective agreement and the nature of that duty in handling grievances arising out of the agreement once it had been negotiated".[38] These authorities have evinced a widespread and frank recognition of the fact that "legislative issues offer less opportunity for invidiousness than grievance questions, because employment standards are customarily framed to blanket a class of employees evenly, whereas their application to particularized situations within a class enables picking and choosing."[39] Professor Summers has similarly emphasized that the final settlement resulting from the negotiation of an agreement constitutes "a single package of assorted benefits which are neither equal nor rational but which will meet the practical needs of the parties and provide peace. . . . For the law to impose substantial limits by inquiring closely into the fairness of the compromises would hinder the parties in arriving at peaceful settlements."[40]

This is not to suggest, however, that the reasons underlying the Union's conduct or position in the instant case would not withstand close and fair scrutiny. Quite to the

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[38] Aaron, "Some Aspects of the Union's Duty of Fair Representation," 22 Ohio St. L. J. 39, 43 (1961).

[39] Dunau, *supra*, note 23, at 760.

[40] Summers, "Individual Rights in Collective Agreements—A Preliminary Analysis," N.Y. U. 12th Annual Conference on Labor 63, 71-72 (1959).

contrary, the protection of employees about to lose their jobs in an age of chronic and severe unemployment and job displacement affords ample reason for ameliorative action by the bargaining representative. The concern of the laboring population over the employment trends of today was expressed by Professor Aaron (*supra*, note 33, at 1563) as follows:

> The impact of our 'raging technology' has become increasingly severe; already it has destroyed or substantially altered the structure of the workers' society built up over the years by collective bargaining and legislation. Wholesale replacement of men by machines in a number of industries has wiped out, or is threatening with imminent extinction, the jobs of thousands of workers who have relied upon the delusive security provided by their seniority. In other industries the nature of the product has changed so completely that the skill requirements are now entirely different, and men who have spent years working on highly skilled jobs no longer have the ability to perform the new tasks. In manufacturing generally, there has been a pronounced shift in manpower needs from "blue collar" workers to "technical and professional personnel."

The trucking industry in particular has felt very keenly the impact of our "raging technology." "There's evidence that the truckers are justified in their fears that they will lose business to the railroads if the present rate trends continue. In 1958, truck lines hauled roughly 80% of all new automobiles from factories to dealers' showrooms. Development of new rail rack cars to haul autos, coupled with rate cuts, has reduced the truckers' share to about 50%. Membership in the National Automobile Transporters Association, a truckers group, has skidded to 60 from 100 since 1958." [41] The fears of the truckers become quite naturally the fears of their employees and where, as in this case, the fears are realized by the threatened extinction of hundreds of jobs, the collective bargaining agent must act.

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[41] "The Wall Street Journal," Vol. CLXII, No. 19, July 26, 1963, pp. 1, 8.

There is no suggestion in the record that the motives behind the Union's action were not consonant with the readily evident reasons available therefor. No different conclusion may be reached than that advanced by the court in the *O'Donnell* case,[42] wherein the circumstances closely resembled those found in the instant case:

> [T]he change of seniority complained of arose as a result of orderly negotiations between [the parties] in an effort to secure the greatest good for the greatest number of the employees [of the merged companies] and an effort to afford continuing employment to men and women who would otherwise have been thrown out of work.

As in the *Campbell* case,[43] the Union here evidenced "honest desires for the protection of the interests of all members of the union." The translation of these desires into action in the arena of seniority had been anticipated, with favor, in *Steele* v. *Louisville and Nashville R.R.*, 323 U.S. 192, 203 (1944):

> Variations in the terms of the contract based on differences relevant to the authorized purposes of the contract in conditions to which they are to be applied, such as differences in seniority . . . are within the scope of the bargaining representation of a craft, all of whose members are not identical in their interest or merit.

When such action had in fact been taken in concrete cases, as in both *Campbell, supra,* and *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953), this Court recognized the validity of its purpose as evincing "a due regard of union interests which embrace the system of seniority rights." (337 U.S. 521, at 527). The attempt of the plaintiffs to show foreknowledge of the facts by the Committee and that the Local had "contrived" the decision must prove unavailing, for advance knowledge of the facts is to be expected and undue influence was not proved at the trial. *Cf. Farris* v. *Alaska*

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[42] *O'Donnell* v. *Pabst Brewing Co.*, 45 LRRM 2059, 2060 (Wis. Cir. Ct. 1959), aff. 107 NW2d 484, 47 LRRM 2554 (Wis. S. Ct. 1961).

[43] *Aeronautical Industrial Dist. Lodge 727* v. *Campbell*, 337 U.S. 521 (1949).

Airlines, Inc., 113 F. Supp. 907 (W.D. Wash. 1953). Nor does "mere disagreement" with the solution arrived at "constitute per se bad faith and breach of statutory duty." *Holman* v. *Industrial Stamping Co.*, 344 Mich. 235, 37 LRRM 2274, 2281 (1955).

With respect to the conduct of officials of the Local Union, a summary of the uncontradicted testimony during the trial below proves highly instructive. At the time that the officials (Priddy and Atterbury) told the Dealers employees "they had nothing to worry about," the former were not aware that an arrangement had been made between the two companies (R. 47, 49, 57). It was rumored that Ford had "ordered" one of them to leave (R. 50). Under such circumstances, a "merger" or "absorption" within the meaning of Article 4, Section 5 was highly unlikely. The rumor was in fact fortified by statements of company officials that Ford "had seen fit to take the business from one carrier and give it to another carrier." (R. 47, 57). The initial step of this particular grievance of the E & L employees was in the hands of the Local Joint Committee, which had to defer on such matters of interpretation to the Joint Conference Committee by the express mandate of Article 7, Section 2(d) (R. 48-49, 55-56). When the matter reached the latter Committee, information of "absorption" came to light and Paul Priddy informed the Dealers shop stewards that his stand would be against their position (R. 56). Priddy withdrew from the panel (R. 50-51, 56, 58) and recommended to the Committee that seniority be dovetailed as between the two groups of employees (R. 57-58). He pointed out that E & L employees should be allowed to "follow their work" to Dealers and that the solution urged would, in the long run, aid the larger part of the working force (R. 57-58). On the other hand, said Priddy, if such arrangement were rejected, the E & L employees—most of whom had greater seniority than the Dealers employees—would either lose their jobs or go to the bottom of the list at Dealers, thus losing credit for many years of service within the multi-employer, multi-

local union bargaining unit (R. 57-59). Priddy testified that his position before the Committee was in no way motivated by prejudice for or against either faction of employees and that it would have been the same "had the other company been the successful one to stay." (R. 54-58).

The foregoing actions and words of the officials contain not the slightest suggestion of malice or bad faith. A comparable situation recently arose in the context of an intra-union dispute within the International Brotherhood of Electrical Workers. The International President was accused in the courts of having acted with malice when, upon a local's rejection of his instructions to desist from striking, he granted a charter to a newly-formed local in the same jurisdiction. The Fourth Circuit Court of Appeals rejected the allegation and rendered significant comment as to the President's duties as a union official:

> His duty was to 750,000 members, not merely to a few who might gain a short-range advantage that could prove costly to the parent body, the employers, the public and, in the long run, to the plaintiffs themselves."[44]

The facts of this case do not reveal any deviation from similar duties with which the Local Union officials had been entrusted.

The issue of whether Dealers employees, as a separate entity, enjoyed "representation" before the Detroit Committee is in any event both hollow and spurious. For it evolves from the unwarranted assumption that these employees or a "separate" representative of their choice had the right to appear before the Committee and participate in its decision-making process. Even the most ardent champions of individual rights under collective agreements have conceded that "the union has plenary power to make an agreement."[45]

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[44] *Parks* v. *IBEW*, 314 F2d 886, 906 (4th Cir. 1963), cert. den. 372 U.S. 976 (1963).

[45] Summers, "Collective Power and Individual Rights In The Collective Agreement—A Comparison of Swedish and American Law," 72 Yale L. J. 421, 440 (1963).

> [T]he employee has no standing to participate in thrashing out the interpretation of an existing employment standard to the extent that it purports to settle the future scope of a disputed existing right. Insofar as it operates prospectively, the interpretation of a standard, no less than its formulation, is within the exclusive province of the representative, for the interpretative process is a policy-making function which calls for the imagination and informed choice of available alternatives in construing an agreement. Whether the result is termed an interpretation or a change of the agreement, its essence is to imbue it with a new meaning to which the employees are bound in the future.[46]

In a significant, recent decision, the General Counsel of the NLRB declined to issue a complaint based upon an individual's charge that the contracting parties illegally failed to notify him of a pending meeting concerning his grievance (NLRB General Counsel Adm. Dec., Case No. SR-2364, CCH NLRB ¶11, 960 Dec. 3, 1962):

> [I]t does not appear from the legislative history of the 1947 amendments that Congress intended to make it an unfair labor practice for the contracting parties to exclude unit personnel from their grievance deliberations, particularly where the basic dispute involves a matter of contract interpretation. Accordingly, and absent any evidence of bad faith on the part of the company or union in the processing of the individual's grievance in the instant case, further proceedings herein were deemed unwarranted.

Moreover, the allegations of the complaint that the Dealers faction was not "represented" by Paul Priddy at the Detroit hearing, even if taken as true, do not constitute such facts as would be prejudicial to the plaintiffs. For the Dealers employees were represented in Detroit by three union shop stewards, who had been elected to their posts by the employees and who made the trip at the Union's expense (R. 36-40, 49, 54). These shop stewards, moreover, spoke up for their cause (R. 37-40, 51). There was no reason, on the facts presented, to reject the finding of the

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[46] Dunau, "Employee Participation in the Grievance Aspect of Collective Bargaining," 50 Col. L. Rev. 731, 748 (1950).

trial court in the instant case that "there were three shop stewards from Dealers Transport attending the Detroit meeting, and it would be a matter of idle speculation to assume that the result would have been different had the matter been differently presented." (R. 18-19). *Cf. Local 149, Automobile Workers* v. *American Brake Shoe Co.*, 45 LRRM 2437 (W. D. Va. 1959), aff. 285 F2d 869; *Bailer* v. *Local 470, IBT*, 400 Pa. 188, 161 A2d 343 (1960); *Farris* v. *Alaska Airlines, Inc.*, 113 F. Supp. 907 (W. D. Wash. 1953).

VI

THE RESPONDENTS HAVE NO LEGAL STANDING TO QUESTION THE DECISION OF THE COMMITTEE ON THE GROUND THAT SUCH DECISION CONSTITUTED A BREACH OF CONTRACT.

Since, as heretofore demonstrated, "hostile discrimination" is not in issue before the Court, it is submitted that the Respondents (plaintiffs-appellants below) have no legal standing to bring into judicial question the decision rendered under the contract by the Joint Conference Committee. The proper approach to be adopted toward the question of "standing to sue" in Section 301 suits has been advanced by Professor Cox in these terms:

> In my opinion the needs of the industrial community would be served best by leaving management and union free to determine by the terms of their collective bargaining agreement what shall be the respective rights of the union and the individual in its administration. The law could fill any gap resulting from the parties' failure to manifest a reasonably clear intention by formulating presumptions based upon considerations of fairness and convenience mixed with an informed hunch as to the 'intent' of the transaction.
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> Unless a contrary intention is manifest, the employer's obligations under a collective bargaining agreement which contains a grievance procedure controlled by the union

> shall be deemed to run solely to the union as the bargaining representative, to be administered by the union in accordance with its fiduciary duties to employees in the bargaining unit. The representative can enforce the claim. It can make reasonable, binding compromises. It is liable for breaches of trust in a suit by the employee beneficiaries."[47]

The opinion expressed by Professor Cox is shared by a considerable number of federal and state courts which have held that individual employees have no standing to compel arbitration, or to attack interpretative decisions of the contracting parties, where the right to do so had not been accorded them by the contract. *Black-Clawson Co., Inc.* v. *Machinists, Lodge 355*, 313 F2d 179 (2d Cir. 1962).[48] While this Court, in *Smith* v. *Evening News Ass'n.*, 371 U.S. 195, 9 L. Ed. 2d 246 (1962), concluded that Section 301 permitted the assertion of jurisdiction over individual suits, it expressly left open the issue of standing:

> The only part of the collective bargaining contract set out in this record is the no-discrimination clause. Respondent does not argue and we need not consider the question of federal law of whether petitioner, under this contract, has standing to sue for breach of the no-discrimination clause nor do we deal with the standing of other employees to sue upon other clauses in other contracts. (at 251, note 9).

Therefore, the question of "standing" depends to a great degree on the language of the contract that had been approved by the individuals within the bargaining unit and to which they are all bound. Article 4, Section 5, which lies at the core of this proceeding, provides that "the seniority of the employees affected" by a merger or absorption of business "shall be determined by mutual agreement between

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[47] Cox, "Rights Under A Labor Agreement," 69 Harv. L. Rev. 601, 618-619 (1956).

[48] See also, *Parker* v. *Borock*, 182 NYS 2d 577, 148 N.E. 2d 324 (1959); *Cortez* v. *Ford Motor Co.*, 349 Mich. 108, 84 N.W. 2d 523 (1957); *U.S.* v. *Voges*, 124 F. Supp. 543 (E.D. N.Y. 1954); see other cases cited in Cox, "Individual Enforcement of Collective Bargaining Agreements," 8 Lab. L. J. 850, 855, Note 31 (1957).

the Employer and the Unions involved." (R. 10). Both that Section and Section 1 as well direct that "any controversy" over seniority be submitted to the joint grievance procedure set forth in Article 7 (R. 9-10). In Article 6, it is stated that "the Employers and the Union . . . shall together create" the Local Joint Committee and the Joint Conference Committee for the purpose of determining contract disputes (R. 10-11). There is no provision for employee participation in the creation of these committees. The Committees are to be composed of Employer and Union delegates only (R. 10-11) and meetings of such Committees "must" be attended by said delegates or their alternates (R. 11). From the first step of the grievance procedure (Article 7; R. 11-13) to the last, disputes are "taken up" between the Union and the Employer.[*] Again, no mention is made of employee participation. "It is agreed that all matters pertaining to the interpretation of any provision of this Agreement, *whether requested by the Employer or the Union*, must be submitted to the . . . Joint Conference Committee (Art. 7, § 2(d); R. 12) (emphasis supplied). Any decision of said Committee "shall be final and conclusive and binding upon the Employer and the Union, and the employees involved." (R. 12). Thus, the entire sense of the contract is to reserve to the contracting parties (the Union(s) and Employer(s) involved) the decision making process, whether in negotiating an agreement or administering it, while binding those parties *as well as the employees* to any resolution emanating from the procedure above outlined.

Where, as here, the contract clearly specifies that its implementation through the grievance procedure is to be reserved to the Union and the Employer alone, suits by individuals attacking the product of the grievance machinery should be excluded from the courts. While in some cases it may be deemed inappropriate to prohibit individual suits for the enforcement or recovery of certain individual

[*] In the *Smith* case, *supra*, the contract contained no grievance procedure (at 248, note 1).

contractual rights and privileges, this is not such a case. The area of dispute in this case is seniority, a creation of the collective agreement whose absence from individual contracts of hire is notable and whose main function is to govern the interrelationship of all employees within the unit. The problem requiring resolution through the grievance machinery was brought about by action taken by two companies, which had no special affect upon any one, two, or even several of the employees, but rather upon the whole body of employees of both companies.

It may not be contended that the adoption of this argument would deprive individuals of rights without which they could not protect their own interests. For individual employees may undoubtedly maintain suits against their representative when the latter hostilely discriminates against them. *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953).[50] They may maintain suits against their representative when wrongfully deprived of their internal union rights. *Gonzales* v. *Machinists*, 356 U.S. 617 (1958). They retain their right, under § 9 of the Labor Management Relations Act, "to present grievances to their employer and to have such grievances adjusted." (*supra*, p. 2). And, of course, individual employees continue to receive ample protection against wrongful conduct of both unions and employers under other provisions of the Labor Management Relations Act (29 U.S.C. 141, et seq.) and the Labor Management Reporting and Disclosure Act of 1959 (29 U.S.C. 401, et seq).

The success of collective bargaining cannot stand impervious to an untrammeled right of individuals to sue. A uniform "common law" of the shop cannot persist in the face of individual suits which, by their very number and na-

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[50] Without necessarily agreeing with the NLRB, we note in this connection that the Board has recently devised a novel theory whereby arbitrary action by a union, even when unrelated to considerations of union membership, may be deemed an unfair labor practice under the Act. *Miranda Fuel Co.*, 140 NLRB No. 7 (1962); *Cf. NLRB* v. *Local 294, Teamsters*, 317 F2d 746 (2d Cir. 1963).

ture, invite divergent rulings both in the grievance process and in the courts. Individuals within the unit who, for one reason or another, stand opposed to the officials of the representative or complain over grievance decisions made by the contracting parties would be encouraged to flood the grievance machinery and the courts with unmeritorious claims and trivial grievances. The process of collective bargaining would then be faced with the irreconcilable force of individual bargaining, the latter creating discrimination and competition within the unit and seeking to transfer the collective process into the courts of law. The same force would, of course, discourage the adjustment of grievances by the Union at lower steps of the grievance procedure—for the responsibility of unions to feret out frivolous claims must collapse if the union is denied the power to effectively exercise it. Furthermore, individual suits claiming damage from action taken by the contracting parties in such areas as seniority, union shop, and check-offs are not likely to be characterized by a mature overview of the problems and needs of the entire bargaining unit which is so essential to the protection of all employees involved. This collective conscience, which the union is trained to employ, must be given full play if the selfish drives of individuals at the expense of group interests and aspirations are to be avoided, as they must.

These were some of the considerations emphasized by the Second Circuit Court of Appeals in the *Black-Clawson* case, *supra*, decided after this Court's decision in *Smith*:

> Our conclusion is dictated not merely by the terms of the collective bargaining structure, and history of Section 9 (a), but also by what we consider to be a sound view of labor-management relations. The union represents the employees for the purposes of negotiating and enforcing the terms of the collective bargaining agreement. This is the modern means of bringing about industrial peace and channeling the resolution of intra-plant disputes. Chaos would result if every disenchanted employee, every disturbed employee, and every employee who harbored a dislike for his employer could harrass both the union and the employer by processing griev-

ances through the various steps of the grievance procedure and ultimately by bringing an action to compel arbitration in the face of clear contractual provisions intended to channel the enforcement remedy through the union.

If employer and union deem it consonant with the efficient handling of labor disputes to repose power in the individual employee to compel the employer to arbitrate grievances, then they may do so, by incorporating such a provision in clear language in the collective bargaining agreement. They have not done so here. (at 186).

CONCLUSION

It is respectfully submitted that, for the reasons stated above, the decision of the court below should be reversed with directions that the permanent injunction outstanding against the contracting parties be dissolved in order to permit the immediate implementation of the award and decision of the Joint Conference Committee.

DAVID PREVIANT
511 Warner Building
Milwaukee 3, Wisconsin

HERBERT S. THATCHER
DAVID S. BARR
1009 Tower Building
Washington 5, D. C.

RALPH H. LOGAN
506 W. Jefferson Street
Louisville, Kentucky

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 17

WALTER HUMPHREY, ETC., ET AL., *Petitioners*

v.

C. W. MOORE, ETC., ET AL., General Drivers, Warehousemen and Helpers, Local Union No. 89, and Dealers Transport Company, *Respondents*

On a Writ of Certiorari to the Court of Appeals of the State of Kentucky

BRIEF FOR PETITIONERS

H. SOLOMON HOREN
Kentucky Home Life Building
Louisville, Kentucky

WILLIAM S. ZEMAN
1 Grand Street
Hartford, Connecticut

MOZART G. RATNER
1411 K Street, N. W.
Washington, D. C.

Counsel for Petitioners

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

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No. 17

WALTER HUMPHREY, ETC., ET AL., *Petitioners*

v.

C. W. MOORE, ETC., ET AL., General Drivers, Warehousemen and Helpers, Local Union No. 89, and Dealers Transport Company, *Respondents*

On a Writ of Certiorari to the Court of Appeals of the State of Kentucky

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals of Kentucky (R. 25-34), is reported at 356 S.W. 2d 241. The opinion, order and judgment of the Jefferson Circuit Court, Chancery Branch, First Division (R. 17-19, 22) are unreported.

JURISDICTION

The judgment and order of the Court of Appeals (R. 35), modifying its order granting permanent injunction (R. 24), were entered on February 13, 1962. A petition for rehearing was overruled May 4, 1962 (R. 35). On July 17, 1962, Mr. Justice Stewart entered an order extending until September 4, 1962, petitioners' time to file a petition for writ of certiorari (R. 62-63). This Court has jurisdiction under 28 U.S.C. § 1257 (3). As parties below (R. 29; 15-16, Tr. 196-199),[1] petitioners have standing. *Mine Workers* v. *Eagle-Picher Co.*, 325 U.S. 335, 338-339 (1945). Certiorari was granted on January 21, 1963 (R. 63). 371 U.S. 966.

STATUTE INVOLVED

The relevant provisions of the Labor Management Relations Act, 1947, 61 Stat. 136, 29 U.S.C. 141, *et seq.*, are set forth in the Appendix *infra*, pp. 55-57.

QUESTION PRESENTED

Whether a state court infringes the statutory authority and discretion of the exclusive bargaining representative to bind its constituents, deprives employees of the benefits of statutory exclusive representation, encroaches upon the federally protected collective bargaining process and thereby violates the Supremacy Clause of the Constitution of the United States, by prohibiting parties to a collective bargaining contract affecting interstate commerce from interpreting and applying it to require dovetailing of

[1] References to the printed Transcript of Record are designated "R."; occasional references to the typewritten Transcript on file with this Court are designated "Tr." References preceding a semicolon are to findings; succeeding references are to evidence.

seniority lists upon absorption of one employer's business by another because in the opinion of the court dovetailing unfairly and unjustly deprives employees of the surviving employer of seniority rights secured by the contract.

STATEMENT

A. The Multi-Employer Unit and Its Agreement

Transporters of new cars and trucks from assembly plants to dealers, so-called truckaway and driveaway companies (R. 10), who delegate collective bargaining responsibility and authority to Automobile Transporters Labor Division, hereinafter called Division (R. 10, 14, 52), constitute a nationwide multi-employer collective bargaining unit (R. 13).[2] The recognized exclusive representative of employees in that unit is National Truckaway and Driveaway Conference, hereinafter called Conference, on behalf of its member local unions, affiliates of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (R. 9, 10, 14, 52-53, 54). The employers and the local unions respectively empower the Division and the Conference "to [negotiate and] sign the contract, the national agreement" (R. 52). Thereafter, a copy is subscribed by each employer and the local union representing his employees (R. 31; 39).

The three-year agreement effective March 1, 1961, provides for employer recognition of the Conference as "the exclusive representative of all employees in the classifications of work covered by this Agreement for purposes of collective bargaining as provided by the

---

[2] Cf. *Teamsters Union* v. *Oliver*, 358 U.S. 283, 284 (1959).

National Labor Relations Act" (R. 9). It further provides:

> "The undersigned Employer agrees to be bound by all of the terms and provisions of this Agreement, and also agrees to be bound by the interpretations and enforcement of the Agreement.
>
> "The Employer further agrees to participate in joint negotiations of any modification or renewal of the Agreement and to become a part of the multi-employer unit set forth in the Agreement." (R. 13)

Provision is made for establishment of a bipartite permanent Local Joint Committee in each city where there are three or more companies covered by the Agreement and a bipartite permanent Joint Conference Committee consisting of "duly elected delegates" of the Division and the Conference (R. 10). The Committees are "to settle disputes which cannot be settled by the Employer and the Local Union in accordance with the procedure established herein" (R. 11).

The contract creates a grievance procedure (Article, 7), under which disputes not settled between the Employer and the Local Union involved may be appealed either to a Local Committee or the Joint Conference Committee (R. 11). However,

> "* * * all matters pertaining to the interpretation of any provision of this Agreement, whether requested by the Employer or the Union, must be submitted to the full Committee of the Automobile Transporters Joint Conference Committee, which Committee, after listening to testimony of both sides, shall make a decision." (R. 12)

The contract expresses "the intention of the parties to resolve all questions of interpretation by mutual agreement" (R. 13). It also states (R. 12):

> "Any decision of the Automobile Transporters Joint Conference Committee shall be final and conclusive and binding upon the Employer and the Union, and the employees involved."

The contract declares that "seniority rights for employees shall prevail"; defines the events which break seniority; requires that seniority lists be maintained and provides for submission of seniority controversies to the grievance procedure (R. 9). Article 4, Section 5, reads as follows (R. 10):

> "In the event that the Employer absorbs the business of another private, contract or common carrier, or is a party to a merger of lines, the seniority of the employees absorbed or affected thereby shall be determined by mutual agreement between the Employer and the Unions involved. Any controversy with respect to such matter shall be submitted to the joint grievance procedure (Article 7)."

B. Application of the Agreement to the Absorption of E & L Routes by Dealers

Dealers Transport Company of Memphis, Tennessee (hereinafter called Dealers), and E & L Transport Company of Detroit, Michigan (hereinafter called E & L), rival carriers of new cars and trucks from the Ford Motor Company, Louisville, Kentucky assembly plant (R. 18, 25, 41-42), and General Drivers, Warehousemen and Helpers, Local Union 89 (hereinafter called Local 89), representing the Louisville terminal employees of both companies (R. 26; 1-2, 18, 54), are parties to the 1961 national agreement, having author-

ized their "negotiating representatives to sign" (R. 52). The printed copy signed by each Company is identical, although the "rider varies somewhat" (R. 39).

For some time prior to August, 1961, rumors reached Local 89 that Ford had decided, in view of its increased use of "piggy-back" rail transportation, to terminate one of its two Louisville carriers (R. 18, 25-26; 41, 42-43). When it appeared that E & L would be the one to go, Paul W. Priddy, president of Local 89 (R. 53), instructed his assistant, Leslie H. Atterbury (R. 45), to interview "officials of the two companies to determine [whether] there was going to be a sale, merger, trade or whatever it might be" (R. 57). In a conference with local officials of both companies, Atterbury was informed "that there was no kind of a trade, understanding, at all, between management of the two companies * * * that Ford Motor Company had seen fit to take the business from one carrier and give it to another carrier." (R. 47, 57). On the basis of this information (R. 47, 49, 57), Priddy and Atterbury told the E & L men that it looked black for them and urged them to look for other jobs (R. 57, Tr. 210, 178, 180, 216), and Atterbury assured the Dealers' men that they had nothing to worry about (R. 47, Tr. 132, 178, 208, 115-116).

Nevertheless, rumors circulated of a deal between E & L and Dealers (R. 50, Tr. 254). In August, 1961, two E & L employees, petitioners Lewis and Baker, filed a grievance invoking Article 4, Section 5, of the Agreement and requesting that E & L employees be "sandwiched in" with Dealers' employees on the basis of seniority acquired at E & L and its predecessor company (R. 7, 28; 54-55, 59-60). When the griev-

ance came before the local committee (R. 55), Priddy stated "this is a matter of interpretation and should rightfully be decided by the people who negotiated the contract" (R. 56); whereupon, by unanimous agreement, the matter was "deadlocked" for submission to the full Committee (R. 48-49, 56). By that time Local 89 had discovered in the Federal Register an application by Dealers to obtain E & L's secondary movement rights out of Louisville (R. 47, 57, Tr. 243-245). However, since neither company had revealed "that one of the companies was buying some of the rights," Local 89 did not "know for sure what the facts were." (R. 57).

Shortly before the hearing before the full Committee, Priddy told the three Dealers' stewards in attendance that he favored dovetailing the seniority lists and that to oppose it, as they wished, was "actually * * * a short sighted view because * * * three months or six months from now Dealers Transport may be completely out of the picture and another carrier in, then you too would have no job * * *." (R. 56, Tr. 115-116, 135). Priddy urged the Committee to dovetail the seniority lists "in the interest of protecting the long time employees of both people, especially since the work is being transferred over to this other operation, in effect these people would be following their work." (R. 58). Priddy testified that his position would have been the same "had the other company been the successful one to stay" (R. 58), and that the opposition of Dealers' employees could not be controlling because "we represent both people and we don't get any money from one more than the other * * *. We have to present the facts and we have to protect people in spite of themselves." (R. 58, 59). He specifically denied any hostility to or bias against Dealers' employees (R. 54, 58).

Mack Snites, Dealers' Vice President and General Manager, followed Priddy and revealed authoritatively that there had been an "understanding between management of the two companies," as to "which one was going to stay"; that "Ford didn't order either one of us out." (R. 57-58, 49-50, 41). He explained that, to consolidate geographically, E & L had agreed to sell its secondary authority out of Louisville to Dealers in exchange for Dealers' initial authority out of Lorraine, Ohio (R. 42-43, 44, 50). Snites admitted that pursuant to this trade Dealers "absorbed a certain portion of" the "business of E & L." (R. 44; cf. R. 7).[3]

On the basis of this testimony (R. 57), the Committee issued a decision directing that within thirty days E & L employees "shall be sandwiched in" on Dealers' "master seniority boards." (R. 59-60). Dealers acquiesced (R. 44) and prepared to comply by replacing 96 junior employees of Dealers with senior E & L employees as of November 25, 1961 (R. 61).

C. Proceedings Below

On November 8, 1961, C. W. Moore, an employee of Dealers, on his own behalf and on behalf of Louisville terminal employees of Dealers as a class, filed in the Circuit Court of Jefferson County a suit for injunction and damages to prevent Local 89 and Dealers from complying with the decision (R. 1-15). Petitioners, Walter Humphrey, Howard Baker, Earl Surface, Ross Johnson, Arthur Gilpin and Ray Lewis, individually and as representatives of E & L employees as a class, were made defendants by amendment (R. 29; 15-16).

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[3] The colloquy reads (R. 44): "Have you taken over, have you absorbed the business of E. & L.? A. We have absorbed a certain portion of it."

The gravamen of the complaint was that the dovetailing decision violated the contract between Dealers and Local 89 (R. 55) inasmuch as a rider to that contract (R. 19), guaranteed all Louisville job opportunities to Dealers' employees[4] and Article 4, Section 6(b)(2), p. 15 of the agreement, dealing with transfers from a closed branch (R. 27),[5] rather than Article 4, Section 5, dealing with absorption by one carrier of the business of another, controlled (R. 5). It alleged that plaintiffs had relied upon the Union to "take care of their interests in [the] grievance" (R. 3); but that the Union had deceived them and "acted against [their] interest" and that the effect was to replace "at least 250 of the 300 original employees of Dealers Transport Company" with "the former employees of E & L Transport Company" (R. 5). Petitioners and Local 89 moved to dismiss the complaint for failure to state facts sufficient to constitute a cause of action (R. 21, 16) and Local 89 because "the jurisdiction of this Court has been preempted by the provisions of the National Labor Relations Act" (R. 21).

The trial court (Judge Macauley L. Smith), after hearing, denied both a temporary and a permanent injunction and granted the motion to dismiss (R. 17, 22). It concurred in the Committee's conclusion that Article 4, Section 5, governed and neither Article 4, Section 6, nor the rider, applied (R. 18-19). It stated: "no

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[4] The pertinent provision of the rider, which had been approved by the National Conference (Tr. 119, 232, 239), reads: "The Louisville domiciled employees of the Employer shall have exclusive rights to all work originating at the Louisville Terminal." (R. 19).

[5] Section 6(b)(2), provides that in cases of branch closings employees of the closed branch "shall go to the bottom of the seniority board."

contention is made that the pertinent facts with respect to this proposed 'merger' or 'absorption' of routes were not truthfully disclosed to the Committee" and "it would be a matter of idle speculation to assume that the result would have been different had the matter been differently presented" (*ibid.*).

The Court of Appeals, two judges dissenting, reversed. It held the Joint Committee's adjudication of "job seniority rights" (R. 25) under the contract so "erroneous" and "violative of natural justice" as to be "arbitrary" (R. 31, 33). Agreeing with the trial court that neither of the provisions relied on by plaintiffs were pertinent (R. 27, 30), it concluded that Article 4, Section 5, did not authorize the decision because it "does not require that the absorbing company take these employees, but only that if it does take them the question of seniority between the old and new employees will be worked out by agreement or else be submitted to the grievance procedures." (R. 31). Moreover, even though the contracts signed by Dealers and E & L are identical, "still they are separate agreements" and E & L employees can claim no benefits or rights under the Dealers contract (R. 31). Therefore, "the question was not arbitrable under the grievance procedure." (R. 31).

The court further held that the Union had no "legitimate business" in the grievance proceeding except as "advocate" of the contractual seniority rights of Dealers' employees and that it was disqualified by the "antagonistic interests" of its E & L constituents and the fact that Union influence "stood to be enhanced by a decision permitting the employment and seniority of its members to cut across company lines." (R. 32).

Finally, the court held that the validity of the decision was open to judicial review because state courts are empowered "to construe and enforce a contract under which [employees] have certain rights of tenure" (R. 29, 31, 33). In its view, absent a claim that the Committee's decision was predicated upon union membership or activity, vindication of such rights pursuant to state law does not amount to exercise of "any jurisdiction in the field of national labor policy." (R. 33).

Accordingly, the court below sustained the orders entered by Chief Judge Robert B. Bird on November 29, 1961 (R. 19-20) and December 15, 1961 (R. 24), enjoining the parties from "putting into effect or enforcing the decision * * * [and ordering] any employees who * * * have lost their jobs by reason of said decision * * * reinstated * * *" (R. 20, 24).

SUMMARY OF ARGUMENT

I

Teamsters Union v. *Oliver*, 358 U. S. 283 (1959) controls this case because the power and freedom of the contracting parties to adjust petitioners' grievance by agreeing to dovetail seniority lists is an aspect of federally protected collective bargaining. To treat individual rights of tenure as a bar to agreement is incompatible with the concept of collective bargaining as "a continuous process" (*Aeronautical Lodge* v. *Campbell*, 337 U. S. 521, 525 (1949)), in which individual interests in prospective employment are necessarily subordinated to the collective interest.

Freedom to bargain collectively means unlimited power to solve by agreement the problem of displace-

ment created by Dealers' absorption of the E. & L.'s routes; to adjust prospectively grievances arising therefrom and to interpret and apply the contract as it relates thereto. *Elgin, J. & E. R. Co.* v. *Burley*, 325 U.S. 711, 723, 739 (1945). Striking down the parties' dovetailing solution constricts the subject matter of collective bargaining and destroys the finality which federal law attaches to it.

Nothing in Section 301 authorizes courts, in the name of enforcing individual rights created by collective agreements, to mutilate the collective bargaining process. Power to enforce individual rights is conferred only to enhance the policy of promoting collective bargaining. Individual rights can be recognized only if, and to the extent that, they do not trench upon the statutory authority of the exclusive bargaining agent. Section 301 cannot be used as a device for reallocating authority as between collective and individual interests, overriding Sections 9(a) and 8(d).

II

The federal function of the exclusive bargaining agent includes resolution of conflicts of interest over seniority and tenure among competing groups of constituents. *Ford Motor Co.* v. *Huffman*, 345 U. S. 330, 338 (1953); *Aeronautical Lodge* v. *Campbell*, 337 U. S. 521, 527 (1949). The process is a legislative one; its purpose is promotion of the collective interest. Individuals and groups have no statutory role in that process, and where, as here, the bargaining agent seeks to promote the collective interest in good faith and does not engage in hostile, invidious, discrimination, none can claim legal injury. Dovetailing is generally regarded as the most equitable solution in merger and absorption cases and is, in any event, indisputably within the ambit of the bargaining agent's author-

ity and discretion. *Kahn, Seniority Problems in Business Mergers,* 8 Ind. & Lab. Rel. Rev. 361, 378 (1955).

III

The federal duty of fair representation preempts the field of obligations owed by a bargaining agent, as such, to its constituents. State courts are not empowered either to invoke their own standards or to enforce the federal one because the duty is a corollary of and inextricably interwoven with the exclusive representatives' power to bind its constituents, and enforcement decisively shapes the capacity of the representative to perform its federal functions. The power and the duty together displace agency concepts derived from state law, concepts which Congress deliberately repudiated. As this case shows, to allow state court participation would invite their reappearance. The National Labor Relations Board is empowered to police the duty of fair representation at least through its control over certifications (*Larus & Brother Co.*, 62 NLRB 1075 (1945)), and perhaps through the unfair labor practice provisions as well. *Plumbers' Union* v. *Borden,* 373 U. S. 690, 696, n. 7 (1963). Thus, *vis-a-vis* State courts, there is an "inescapable implication of exclusiveness." *Guss* v. *Utah Labor Board,* 353 U. S. 1, 10 (1957).

IV

The state court's disclaimer of intention "to exercise any jurisdiction in the field of national labor policy" emphasizes the need for explicit reaffirmation that the process and the products of collective bargaining affecting interstate commerce are, in all respects, within that field.

ARGUMENT

Teamsters Union v. *Oliver*, 358 U.S. 283 (1959), controls this case. Like the "lessor-driver" clause Ohio illegalized, the dovetailing decision which the court below set aside is "the product of the exercise of federally sanctioned collective bargaining rights." *Oliver* case, *supra*, 358 U.S., at 289, 297. It has "the imprimatur of the federal law upon it * * *." *Railway Dept.* v. *Hanson*, 351 U.S. 225, 232 (1956). Destruction defeats Congress' object in fostering collective bargaining under the aegis of federal law and deprives employees of the benefits that system is designed to secure. To attack a product of contract administration which comports with "the federal scheme" is as "fatal to the goals of the Act" (*Machinists* v. *Central Airlines*, 372 U.S. 682, 691 (1963)), as to strike down the contract itself.

I.

FEDERAL LAW GUARANTEES AND PROTECTS FREEDOM TO BARGAIN COLLECTIVELY ABOUT ABSORPTION OF DISPLACED EMPLOYEES

A. Individual Rights Are Vulnerable To Collective Bargaining During the Contract Term

The court below held the Joint Committee powerless to grant petitioners' grievance on the ground that the contract as written does not compel an acquiring company to employ displaced employees, or give displaced employees a right to be absorbed (R. 31). In consequence, in its view, the contract gives employees of the acquiring company a vested immunity against compulsory absorption. The unarticulated premise is that rights and immunities affecting tenure are invulnerable during the life of a collective agreement. The short answer is that they are not.

The interest of groups and individuals in continuing to enjoy the benefits of a collective bargaining contract as written does not brake the power of the contracting parties to make changes. "It is of the essence of collective bargaining that it is a continuous process. Neither the conditions to which it addresses itself nor the benefits to be secured by it remain static." *Aeronautical Lodge* v. *Campbell*, 337 U.S. 521, 525 (1949).

> "Neither the right of a Union to bargain for its members nor the correlative duty of an employer to recognize and bargain with such agent ends upon the signing of a contract. 'For the collective bargaining power is not exhausted by being once exercised; * * *.' *Elgin, Joliet and Eastern Railway Co.* v. *Burley*, 325 U.S. 711, 739." *Union News Co.* v. *Hildreth*, 295 F. 2d 658, 664 (6th Cir. 1961).

The Act recognizes that contracting parties are empowered by agreement during the life of their contract to change its terms and conditions. Section 8(d), added in 1947, guarantees each party against compulsion "to discuss or agree to any modification of the terms and conditions contained in a contract * * * if such modification is to become effective before said terms and conditions can be reopened under the provisions of the contract * * *." Enactment reversed the rule that the duty required bargaining over modification.[6] The new provision thus assumes that the parties are at liberty to modify by agreement, for it would be pointless to protect against compulsion if there were no power to make effective changes voluntarily. If employee interests in existing benefits and

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[6] Weyand, *The Scope of Collective Bargaining Under the Taft Hartley Act*, in N.Y.U. First Ann. Conf. on Labor 257, 260 (1948).

terms and conditions were a bar, contracting parties would be powerless to bargain for modifications.

To treat rights established by an agreement as immutable during its life is not only to disregard the character of collective bargaining as a "continuous process" but to elevate individual and group interests above the "collective interest [which] by law * * * the Union [is] charged with protecting." *Union News Co.* v. *Hildreth*, 295 F. 2d 658, 666 (6th Cir. 1961). This, the National Act forbids. The statutory authority of the exclusive agent completely occupies the field of bargaining over tenure and terms of employment. "The majority union is * * * vested by statute with exclusive authority to speak for and bind the individual, and his freedom of choice is limited to participating in the majority election which determines which is the union.'" Once an exclusive representative has been chosen by the unit, "all powers which the employees theretofore had to contract with their employer either individually, in groups, or through some agent of their choice become vested exclusively in the statutory bargaining representative.'"[7]

Individuals or groups cannot by contract limit the exclusive agent's authority or defeat it by making agreements of their own. *J. I. Case Co.* v. *Labor Board*, 321 U.S. 332 (1944); *May Stores Co.* v. *Labor Board*, 326 U.S. 376 (1945); *Labor Board* v. *Crompton Mills*, 337 U.S. 217 (1949). Individual or group agreements must be superseded by the collective agreement

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[7] Summers, *Collective Power and Individual Rights in the Collective Agreement*, 72 Yale L.J. 421, 423 (1963).

[8] Weyand, *The Scope of Collective Bargaining Under the Taft-Hartley Act*, in N.Y.U. First Ann. Conf. on Labor, 257, 270 (1948).

because contracts made on behalf of individuals and groups do not serve the collective interest. *Telegraphers* v. *Railway Express Agency*, 321 U.S. 342 (1944). For the same reason, if rights and immunities established by a collective agreement cease to serve that interest, their preservation in the interest of individuals or groups would be incompatible with the goal of the statute.

Unfettered power in the exclusive representative to appraise the collective interest is the *sine qua non* of its vindication. "Unless those upon whom is placed the responsibility for protecting collective interests are given the authority needed to discharge such responsibility, the entire process is of doubtful worth." *Union News Co.* v. *Hildreth*, 295 F. 2d 658, 667 (6th Cir. 1961); *Black-Clawson Co.* v. *International Ass'n of Mach.*, 313 F. 2d 179, 186-187 (2d Cir. 1962).

"The most important purpose of the Wagner Act was to create aggregations of economic power on the side of employees countervailing the existing power of corporations to establish labor standards." Cox, *The Duty To Bargain in Good Faith*, 71 Harv. L. Rev. 1401, 1407 (1958). That purpose can be achieved only by subordinating individual and group interests to the collective interest, and entrusting effectuation of that interest to the democratically chosen exclusive representative. Therefore, "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and to restrict the rights of those who it represents." *Steele* v. *L. & N. R. Co.*, 323 U.S. 192, 204 (1944); *Hughes Tool Co.* v. *NLRB*, 147 F. 2d 69, 72-73 (5th Cir. 1945). In *J. I. Case Co.* v. *Labor Board*, 321 U.S. 332, 388 (1944), this Court said:

> "The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group."

To the argument that "some employees may lose by the collective agreement" this Court replied (*ibid.*, at 338-339):

> "Its benefits and advantages are open to every employee of the represented unit * * *.
>
> "[Beyond that, the] practice and philosophy of collective bargaining looks with suspicion on * * * individual advantages. * * * [A]dvantages to individuals may prove as disruptive of industrial peace as disadvantages. They are * * * often earned at the cost of breaking down some other standard thought to be for the welfare of the group, and always creates the suspicion of being paid at the long-range expense of the group as a whole. * * * The workman is free, if he values his own bargaining position more than that of the group, to vote against representation; but the majority rules, and if it collectivizes the employment bargain, individual advantages or favors will generally in practice go in as a contribution to the collective result."

To immunize individual or group rights of tenure against the authority of the bargaining agent is, consequently, to reject the rationale of statutory collective bargaining. "There are countless situations in which the very concept of collective action demands that unions have the power to influence the employer to make changes in the job status of individual employees." *NLRB* v. *Local 294, Teamsters*, 317 F.2d 746, 751 (2d Cir. 1963). The complaint on its face shows (R. 5)

that Dealers' employees sued to retain the seniority benefits they had derived from collective representation in the past at the expense of contemporary effectuation of the collective interest. They sought to jettison selected disadvantages of collective action while preserving selected advantages. Collective bargaining as an institution could no more survive such assault than Government could survive without taxes.

The fundamental error of the court below lay in assuming authority to consider the contract a source of limitation upon the power of the exclusive representative and the employer jointly to control terms and tenure of employment. That power flows from the statute. It is not subject to external limitation as an incident of judicial enforcement or interpretation of the parties' contract. Of course if a collective agreement provides that a right or immunity shall not be altered during its life either party may insist that the other adhere to that commitment. But third parties are forbidden to foreclose them from mutually agreeing to change. Foreclosure would restrict the scope of voluntary collective bargaining, in the teeth of Section 8(d), reducing its utility as an instrument of industrial peace. *Labor Board* v. *Borg-Warner Corp.*, 356 U.S. 342, 350 (1958); *Labor Board* v. *American Ins. Co.*, 343 U.S. 394, 405, n. 15 (1952); *Oliver* case, *supra*, 358 U.S., at 295.

Thus, even a provision expressly forbidding bargaining about employment of persons affected by future mergers or absorptions would have been no bar to the parties. Once "the majority * * * collectivizes the employment bargain" individuals and groups are not empowered to thwart the process by which tenure may be considered and adjusted in the common

interest of all. "Chaos would result if every disenchanted employee * * * could harass both the union and the employer * * *." *Black-Clawson Co.* v. *International Ass'n of Mach.*, 313 F.2d 179, 186 (2d Cir. 1962). For a court to interfere in the interest of enforcing individual rights is to violate the "right of the employees protected by Section 7" to bargain collectively "through their representatives." *Oliver* case, *supra*, 358 U.S. 283, 295.[9]

Since, instead of forbidding, the contract requires, the parties to bargain over future mergers and absorptions,[10] interference to protect the *status quo* is, *a fortiori*, prohibited. "Whether a contract should contain a clause fixing standards for such matters [as mergers] * * * or should provide for more flexible treatment * * * is an issue for determination across the bargaining table * * *." *Labor Board* v. *American Ins. Co.*, 343 U.S. 395, 409 (1952). Where the parties

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[9] Cf. *Lewellyn* v. *Fleming*, 154 F. 2d 211, 214 (10th Cir. 1946); *McMullans* v. *Kansas, Oklahoma & Gulf Ry. Co.*, 229 F. 2d 50 (10th Cir. 1956), cert. denied, 351 U.S. 918 (1956); *Union News Co.* v. *Hildreth*, 295 F. 2d 658, 664-667 (6th Cir. 1961); *Brotherhood of Railroad Trainmen* v. *Texas & P. Ry. Co.*, 159 F. 2d 822, 826-827, 828 (5th Cir. 1947); *Roberts* v. *Western P. R. Co.*, 142 Cal. App. 2d 317, 298 P. 2d 120, 123 (1956), cert. denied 352 U.S. 937 (1956); *Edelstein* v. *Duluth, M. & I. R. Co.*, 225 Minn. 508, 31 N.W. 2d 465, 472-473 (1948); *Napier* v. *System Federation No. 91*, 127 F. Supp. 874, 888-889 (W.D. Ky. 1955); *Fagan* v. *Pennsylvania R. Co.*, 173 F. Supp. 465 (M.D. Pa. 1959).

[10] "Many provisions do little but establish the framework for further bargaining. Others have a generality which obviously looks to joint labor-management particularization. Deliberate ambiguities, inadvertent omissions, and unforeseen contingencies require continual rule making which, passing in the guise of interpretation, parallels the law making of courts and administrative agencies." Cox, *Rights Under A Labor Agreement*, 69 Harv. L. Rev. 601, 606 (1956).

choose flexible treatment through the grievance procedure, Section 8(d) imposes upon them a duty to bargain collectively when the problems envisaged arise.[11] "The grievance procedure is * * * a part of the continuous collective bargaining process." *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 581 (1960).

> "It is * * * settled law that the union's right to bargain and the employer's correlative duties are not limited to the negotiation of an agreement. Both the NLRB and the courts have consistently held that to refuse to discuss grievances and questions of contract interpretation violates section 8(a)(5)." Cox, *op. cit. supra*, note 10, p. 622.

Here, as elsewhere when it "required [the parties] to negotiate in good faith toward solving" a problem

> "Congress was not concerned with the substantive terms upon which the parties agreed. * * * [It left them] to work out their agreement themselves." *Oliver* case, *supra*, 358 U.S., at 296, 295.

Since "the federal law operates here, in an area where its authority is paramount, to leave the parties free" for a court to limit "the solutions that the parties' agreement can provide" is necessarily inconsistent with federal policy and "outside the power of the State." *Oliver* case, *supra*, 358 U.S., at 296.

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[11] See generally, Weyand, *Majority Rule In Collective Bargaining*, 45 Col. L. Rev. 556 (1945); *The Scope of Collective Bargaining Under the Taft-Hartley Act*, in N.Y.U. First Ann. Conf. on Labor, 257 (1948); Cox & Dunlap, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 Harv. L. Rev. 389 (1950); Findling & Colby, *Regulation of Collective Bargaining by the National Labor Relations Board—Another View*, 51 Col. L. Rev. 170 (1951).

If, as we have seen, the premise that individual rights of tenure arising from a collective bargaining contract are invulnerable to defeasance by mutual agreement is incompatible with the statutory concept of collective bargaining, power to impose limitations cannot be predicated upon such rights. To hold otherwise would defeat the very public policy which is the source of the contract. See pp. 38-39, *infra*. *Cf. Shelley* v. *Kraemer*, 334 U.S. 1 (1948).

B. Individual Rights Cannot Thwart Prospective Adjustment of Grievances

The court below trenched upon the federally guaranteed freedom of the contracting parties to adjust grievances. In *Elgin, J. & E. R. Co.* v. *Burley*, 325 U.S. 711 (1945), this Court recognized that insofar as grievances entail adjustments looking to the future, the bargaining agent has inherent authority by virtue of its statutory status to dispose of them in the collective interest. It was precisely in defining the boundaries of the agent's statutory authority that prospective adjustments were distinguished from retroactive ones. *Union News Co.* v. *Hildreth*, 295 F. 2d 658, 664 (6th Cir. 1961).[12] This Court distinguished on the ground that collective bargaining looks

> "* * * to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.
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> * * *
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> "To settle for the future alone, without reference to or effect upon the past, is in fact to bargain collectively, that is, to make a collective agreement. That authority is conferred independently

[12] See also, *Hughes Tool Co.* v. *NLRB*, 147 F. 2d 69, 72-73 (5th Cir. 1945); *Steele* v. *L. & N. R. Co.*, 323 U.S. 192, 202 (1944).

> of the power to deal with grievances, as part of the power to contract 'concerning rates of pay, rules, or working conditions.' It includes the power to make a new agreement settling for the future a dispute concerning the coverage or meaning of a pre-existing collective agreement. For the collective bargaining power is not exhausted by being once exercised; it covers changing the terms of an existing agreement as well as making one in the first place.
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> "But it does not cover changing them with retroactive effects upon accrued rights or claims. For it is precisely the difference between making settlements effective only for the future and making them effective retroactively to conclude rights claimed as having already accrued which marks the statutory boundary between collective bargaining and the settlement of grievances." *Elgin* case, *supra*, 325 U.S., at 723, 739.

Congress codified this definition of collective bargaining and approved the distinction between fully matured and prospective claims in Section 8(d) and the amendment to Section 9(a).[13] The broad definition in Section 8(d) shows that Congress agreed that "effective collective bargaining * * * include[s] the right of the representative of the unit to be consulted and to bargain about the exceptional as well as the routine rates, rules and working conditions" because "exceptional situations often * * * introduce competitions and discriminations that are upsetting to the entire struc-

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[13] Weyand, *The Scope of Collective Bargaining Under the Taft-Hartley Act*, in N.Y.U. First Ann. Conf. on Labor, 257, 277-278 (1948); Dunau, *Employee Participation in the Grievance Aspect of Collective Bargaining*, 50 Col. Rev. 730, 735-751 (1950); cf. Cox, *Rights Under a Labor Agreement*, 69 Harv. L. Rev. 601, 621-624 (1956).

ture." *Telegraphers* v. *Ry. Express Agency*, 321 U.S. 342, 346-347 (1944). Accordingly, in adding authority to adjust "without the intervention of the bargaining representative" to the preexisting authority of individuals and groups to "present" grievances, Congress must have contemplated "grievances" in the *Burley* sense, *i.e.*, fully accrued and matured claims which are not encompassed in the statutory authority of the exclusive representative. The legislative history shows that the amendment was designed to "accord with" *Burley*. 1 Leg. Hist., L.M.R.A., 781; 93 Cong. Rec. 3624-3625 (1947). To include prospective adjustments would attribute to Congress an intent to defeat the very collective representation which it considered essential to fair resolution of conflicts of interest.[14]

It is unthinkable that courts are empowered to protect individual rights to prospective employment at the expense of the authority of the bargaining agent to adjust grievances prospectively. So to hold would remove grievance adjustment from the sphere of collective bargaining. Since the adjustment petitioners requested related to future employment only, their grievance was within the statutory province of the exclusive bargaining agent to adjust. Interference invaded the preempted field and deprived petitioners of their Section 7 right to have their grievance adjusted by the exclusive bargaining agent. *Hill* v. *Florida*, 325 U.S. 538 (1945).

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[14] Cf., *Pekar* v. *Local 181, Brewery Workers*, 311 F. 2d 628, 637 (6th Cir. 1962), cert. denied, 373 U.S. 912 (1963), with *Union News Co.* v. *Hildreth*, 295 F. 2d 658 (6th Cir. 1961), and *Black-Clawson Co.* v. *International Ass'n of Mach.*, 313 F. 2d 179, 184, 186 (2d Cir. 1962).

C. Individual Rights Cannot Impair the Power of Contracting Parties to Agree Upon Interpretation of Their Contract

The court below likewise trenched upon the federally guaranteed power of the contracting parties to interpret their own agreement. Congress defined "collective bargaining" in Section 8(d) to comprehend resolution of any "question arising * * * under" a collective agreement. Questions as to the meaning and scope of the agreement, such as whether Article 4, Section 5, encompasses dovetailing, are indisputably questions "arising * * * under" the agreement. Petitioners' request (R. 2-3) that they "be sandwiched in with the employees of Dealers Transport Company and given seniority on the basis of the seniority which * * * they had acquired with E & L Transport Company" clearly posed such a question. Even on the view of the court below, petitioners' grievance entailed "interpretation" of the agreement in "application" to the situation created by Dealers' absorption of E & L routes.

The contention (R. 31) that absorption is not within the realm of interpretation because the contract "does not mention" initial employment "is pure sophistry." *Livingston* v. *John Wiley & Sons*, 313 F. 2d 52, 60 (2d Cir. 1963), cert. granted, 373 U.S. 908 (1963). It has been held that controversies over seniority created by mergers, consolidations, purchases, etc., are not excluded from the area of interpretation by the fact that separate employers are involved, even if there is no multi-employer unit. *Livingston* case, *supra*, 313 F.2d, at 56. Consequently, even if the view of the court below on the merits were arguable, the issue raised by petitioners' grievance would be within the scope of the contracting parties' power to settle. To vitiate their resolution is to contravene the directive of federal law

that such questions should, if possible, be resolved by the contracting parties within their own "system of industrial self-government." *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 580 (1960).

Section 203(d) places the matter beyond dispute, for it provides that "grievance disputes arising over the application or interpretation of an existing collective bargaining agreement" should be settled finally by a method "agreed upon by the parties." The contracting parties were authorized both to select the method by which the absorption question should be adjusted and to make adjustment by that method "final." They did this by providing for submission to the Joint Committee and declaring its decisions "final and conclusive and binding upon the Employer and the Union, and the employees involved" (R. 12). Congress could not have made it plainer that such declarations are to be respected. *Drivers Union v. Riss & Co.*, 372 U.S. 517, 519 (1963).

To upset an interpretation agreed on by the parties in the interest of individual or group "rights" is entirely inconsistent, moreover, with the plain language of the proviso to Section 9(a). That proviso accords to individuals the right to present and adjust grievances without the intervention of the bargaining representative only "as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect." Dealers' employees were thus barred by the proviso from processing as a grievance the complaint they presented to the court below because the "adjustment" they sought was inconsistent with the terms of the "agreement then in effect," as both of the contracting parties construed it. "Parties to a contract may agree as to its meaning.

* * * That is what the interpretation here amounted to." *Edelstein* v. *Duluth, M. & I. R. Ry. Co.*, 225 Minn. 508, 31 N.W. 2d 465, 472 (1948). Congress did not empower courts, any more than it empowered employers, at the instance of individuals or groups to make "adjustments" inconsistent with the terms of an existing collective agreement.

D. Dovetailing May Not Be Excluded from the Scope of Collective Bargaining

For federal preemption of the collective bargaining process and Congress' assurance to the parties of freedom to devise their own terms of settlement of industrial disputes, the court below substituted restrictions grounded in free-wheeling "common sense" (R. 32) and "natural justice" (R. 33) notions. The effect is to remove absorption of displaced employees not merely from the area of mandatory collective bargaining (*Oliver* case, *supra*, 358 U.S., at 294-295), but even from the area of permissible bargaining, making it a unique management prerogative. But "seniority rights * * * are mandatory bargaining subjects." *Marine & Shipbuilding Workers* v. *NLRB*, 3 Cir. decided July 30, 1963, 53 LRRM 2878, 2882; *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953); *Aeronautical Lodge* v. *Campbell*, 337 U.S. 521 (1949). The court below assumed power to forbid what, on any theory, federal law allows. A result more antithetical to Congress' choice of collective bargaining as the ideal solvent for employment problems is impossible to imagine.

The conflict is grounded in the view of the court below that to make tenure dependent upon the decision of the bargaining agent is to reduce employees "to the status of pawns instead of free men" (R. 33).

Thus, collective bargaining is equated with serfdom. Congress, however, equated collective bargaining with freedom.

> "The purpose of the written trade agreement is, not primarily to reduce to writing settlements of past differences, but to provide * * * for the orderly government of the employer-employee relationship in the future. The trade agreement thus becomes, as it were, the industrial constitution of the enterprise, setting forth the broad general principles upon which the relationship of employer and employee is to be conducted. * * * [I]t provides a framework within which the process of collective bargaining may be carried on * * *. [It permits] reason and not force * * * to have sway in industrial relationships * * *. [Collective agreements] not only provide standards by which industrial disputes may be adjusted, but they add dignity to the position of labor and remove the feeling on the part of the worker that he is a mere pawn in industry subject to the arbitrary power of the employer." *NLRB* v. *Highland Park Mfg. Co.*, 110 F. 2d 632, 638 (4th Cir. 1940).

Congress considered collective bargaining the democratic alternative to industrial feudalism. In the industrial world, as in society, the price of freedom is submission to the authority of democratic government to make, interpret and enforce law. Obedience is not serfdom; it is freedom's alternative to anarchy.

The court below chose anarchy. Its opinion does not appear to hold that the seniority rights of Dealers' employees barred Dealers from employing E & L employees if Dealers should elect to do so. Once "the absorbing company agrees to take the employees of the Company whose business is being absorbed" (R. 31), Article 4, Section 5, admittedly comes into play.

Thus, "if [Dealers'] does take them," the seniority rights of its employees would not preclude dovetailing or any other solution of seniority questions under the grievance procedure. It would seem that if the contract rights of Dealers' employees are not enough to bar dovetailing after Dealers hires E & L employees, they would not be enough to prevent Dealers from hiring them.

On this hypothesis, the absorbing company has an option to employ or not as it pleases. However, since the absorbing company explicitly agreed "to be bound by the interpretations and enforcement of the Agreement" (R. 13, Art. 38), this option cannot be attributed to the contract. It must, and does, reflect a rule of state law prohibiting an absorbing employer from delegating to his representative, or bargaining away in advance, his power of decision in this area. Cf. *Local 1976, Carpenters* v. *Labor Board*, 357 U.S. 93, 106-107 (1958). Such a rule drastically curtails, if it does not altogether destroy, power to bargain collectively about absorption. And the effect, of course, is to reduce all employees again to the status of "pawns" of employers, "for the circumstance of the [absorption is] a matter beyond [employees'] control * * *." *Holman* v. *Industrial Stamping Co.*, 344 Mich. 235, 74 N.W. 2d 322 (1955). And so Kentucky would destroy the entire "practice and philosophy of collective bargaining" for the sake of short run "individual advantages * * * paid at the long range expense of the group as a whole." *J. I. Case Co.* v. *Labor Board*, 321 U.S. 332, 338-339 (1944).

Employment of displaced employees, like abolition of jobs (*Telegraphers* v. *Chicago & N.W. R. Co.*, 362 U.S. 330, 340-341 (1960)); subcontracting (*Fiber-*

board Products Corp. v. *NLRB*, 53 LRRM 2666 (D. C. Cir., July 3, 1963), enforcing 138 NLRB No. 67, 51 LRRM 1101; *Town & Country Mfg. Co.* v. *NLRB*, 316 F. 2d 846 (5th Cir. 1963)); potential attrition of job opportunities through inadequate rentals for leased equipment (*Oliver* case, *supra*, 358 U.S., at 294), and other matters which affect availability, "security, seniority and stability of * * * jobs" (*Telegraphers* case, *supra*, 362 U.S., at 340), is "subject matter as to which federal law directs [the parties] to bargain" (*Oliver* case, *supra*, 358 U.S., at 295). Who is to have jobs and rules to govern such decisions are self-evidently included in the phrase "terms and conditions of employment." *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 337 (1953); *Aeronautical Lodge* v. *Campbell*, 337 U.S. 521, 525-527 (1949); *NLRB* v. *Local 294, Teamsters*, 53 LRRM 2248, 2251 (2d Cir., May 21, 1963). "It is not to be doubted that an [employer] and a labor union representing the [employer's] employees, lawfully may bargain about and agree upon matters in mitigation of hardships to employees who are displaced by * * * unifications or abandonments * * *." *Telegraphers* v. *Chicago & N.W. R. Co.*, 362 U.S. 330, 357 (1960) (dissenting opinion); *United States* v. *Lowden*, 308 U.S. 225, 230, 233, 235-236, 238 (1939); *Pekar* v. *Local 181, Brewery Workers*, 311 F. 2d 628 (6th Cir. 1962), cert. denied, 373 U.S. 912 (1963).

> "What is under the 'protection' of the federal Act in this case is the freedom to resolve at the bargaining table the problem of * * * seniority rights raised by [Dealers' absorption of E. & L.'s routes]. * * * To enjoin defendants * * * would be to unduly restrict that freedom of collective bargaining which the Supreme Court has declared

to be one of the paramount objectives of the Federal Act." *Holman* v. *Industrial Stamping Co.*, 344 Mich. 235, 74 N.W. 2d 322, 331 (1955).

To say that this freedom does not exist until the absorbing employer unilaterally undertakes to hire the employees of the absorbed company is to overlook that Section 2(3) of the Act specifically says that the term "employee * * * shall not be limited to the employees of a particular employer"; and that Section 2(9) defines "labor dispute" to include controversies over "*tenure*" of employment "regardless of whether the disputants stand in the proximate relation of employer and employee." *Phelps Dodge Corp.* v. *Labor Board*, 313 U.S. 177 (1941). Moreover, it is to ignore the historic predicate of the concept, central to the entire Act, that "[t]o render [unionization] at all effective, employees must make their [Union] extend beyond one shop. It is helpful to have as many as may be in the same trade in the same community united * * *." *American Foundries* v. *Tri-City Council*, 257 U.S. 184, 209 (1921); *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 502-503 (1940).

Not only is there no rationale in federal policy for excluding the subject of absorption from the area of collective bargaining, federal policy manifestly compels its inclusion. Thus, it is obvious that "when a merger involves two or more groups of employees each having separate seniority rights * * * [i]ndustrial strife may arise by reason of a dispute between the two or more groups * * *." *Kent* v. *Civil Aeronautics Board*, 204 F. 2d 263, 266 (2d Cir. 1953), cert. denied, 346 U.S. 826 (1953). "The now extensive history of legislation regulating the relations of * * * employees and employers plainly evidences the awareness of

Congress that" resolution of such disputes through collective bargaining promotes "just and reasonable treatment of * * * employees," avoids disruption of commerce through strikes and "promotes efficiency, which suffers through loss of employee morale when the demands of justice are ignored." *United States* v. *Lowden*, 308 U.S. 225, 235-236 (1939). Therefore, national policy demands that "the issue should be resolved," not unilaterally by the employer, but "by negotiation or arbitration." *Outland* v. *Civil Aeronautics Board*, 284 F. 2d 224, 226 (1960); *Holman* v. *Industrial Stamping Co.*, 344 Mich. 235, 249-250, 74 N.W. 2d 322, 328 (1955).

By its approval and encouragement of multi-employer unit bargaining (*Labor Board* v. *Truck Drivers Union*, 353 U.S. 87, 94 (1957)), national policy facilitates the enhancement of job security which results when conventional seniority is permitted to cross the single employer line. Employees may regard this as one of the major advantages of multi-employer bargaining. At least where, as here, employers have countered their employees' choice of the same bargaining representative with creation of a multi-employer unit, "[n]othing in the * * * Act * * * so limits the vision and action of a bargaining representative that it must * * * limit seniority * * * solely to" (*Huffman* case, *supra*, at 343), employees of a single employer.[18]

The court below predicated a legal limitation on the theory that signature of separate though identical contract booklets kept each employer and his employees "strangers" to the others (R. 31). But the National

[18] See, *e.g.*, Wortman, *Labor Relations Decision-Making in the Membership of Employers' Associations*, 14 Lab. L.J. 587 (July, 1963).

Labor Relations Board treats that form of signature as evidence of membership in a multi-party unit and "consent to be bound" by a uniform contract.[16] Thus, the court below grounded decision upon fragmentation and destruction of multi-employer bargaining which federal law fosters and protects.

If, however, the opinion can be read as requiring the Joint Committee to respect "rights of tenure" of Dealers' employees (R. 33), rather than Dealers' discretion to employ or not to employ E & L men, the conflict is not lessened. Federal law denies, and consequently precludes the states from attributing, to seniority rights immunity to alteration by the bargaining agent at any time. The "conventional uses of the seniority system in the process of collective bargaining" (*Aeronautical Lodge* v. *Campbell*, 337 U.S. 521, 526 (1949)); include future "promotions, transfers, layoffs and similar matters." *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 338 (1953). Therefore, to treat seniority rules and tenure flowing from their prospective application as "vested rights" would exhaust the bargaining process by a single exercise, thwarting its capacity to deal with changed conditions. Seniority would become not a "part of the process of collective bargaining" (*Campbell* case, *supra*, 337 U.S., at 526), but a negation of it.

It is therefore almost universally recognized that alteration of systems of seniority and their consequences is within the province of the exclusive bargaining agent in the process of contract modification, interpretation

[16] *Neville Foundry Company*, 122 NLRB 1187, 1188 (1959); *Charles H. Harper and Frank Harper*, 117 NLRB 1031, 1032 (1957); NLRB, *Twenty Fourth Annual Report* (Govt. Print. Off. 1960), p. 40.

and enforcement.[17] Of course, the fact that alteration adversely affects the tenure of some does not make it taboo. "The complete satisfaction of all who are represented is hardly to be expected." *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 338 (1953). Were it otherwise the province of collective bargaining would be narrow indeed. "Seniority rights provided for in a collective agreement may be modified or eliminated by agreement of the union and the employer so long as they act in good faith, and this change may be affected

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[17] Recognition that seniority rights are susceptible not only to interpretation but to change by agreement of the bargaining agent and the employer is virtually universal. *E.g.*, *Colbert* v. *Brotherhood of Railroad Trainmen*, 206 F. 2d 9 (9th Cir. 1953), cert. denied, 346 U.S. 931 (1954); *Hardcastle* v. *Western Greyhound Lines*, 303 F. 2d 182, 188 (9th Cir. 1962), cert. denied, 371 U.S. 920 (1962); *Pellicer* v. *Brotherhood of Ry. & S.S. Clerks*, 217 F. 2d 205 (5th Cir. 1954), affirming S.D. Fla., 118 F. Supp. 254 (1953), cert. denied, 349 U.S. 912 (1955); (but cf. *Woodward Iron Co.* v. *Ware*, 261 F. 2d 138 (5th Cir. 1958)); *Elder* v. *N. Y. Central R. Co.*, 152 F. 2d 361, 364, 365 (6th Cir. 1945); *Spires* v. *Southern Ry. Co.*, 204 F. 2d 453 (4th Cir. 1953); *Starke* v. *New York, Chicago & St. Louis R. Co.*, 180 F. 2d 569 (7th Cir. 1950); *Johnson* v. *Archer-Daniels Midland Co.*, 203 F. Supp. 636, 638, 640 (E.D. Mich. 1962); *Giordano* v. *Mack Trucks, Inc.*, 203 F. Supp. 905 (D. N.J. 1962); *Donovan* v. *Travers*, 285 Mass. 167, 188 N.E. 705, 707 (1934); *Cortez* v. *Ford Motor Co.*, 349 Mich. 108, 84 N.W. 2d 523 (1957); *Walker* v. *Penn-Reading S. Lines*, 142 N.J. Eq. 588, 61 A. 2d 453, 462-463 (1948); *Coley* v. *Atlantic Coast Line R. Co.*, 221 N.C. 66, 19 S.E. 2d 124 (1942); *Roberts* v. *Western P.R. Co.*, 142 Cal. App. 2d 317, 298 P. 2d 120, 123, cert. denied, 352 U.S. 937 (1956); *Brotherhood* v. *Girard Lodge*, 384 Pa. 248, 120 A. 2d 523, 528 (1956); *Pratt* v. *Wilson Trucking Co.*, 214 Ga. 385, 104 S.E. 2d 915 (1958); see also, *Oddie* v. *Ross Gear & Tool Co.*, 305 F. 2d 143 (6th Cir. 1962), reversing 195 F. Supp. 826 (1961), cert. denied, 371 U.S. 956 (1962); *Zdanok* v. *Glidden Co.*, 288 F. 2d 99, 103 (2d Cir. 1961), aff'd without consideration of this issue, 370 U.S. 530 (1962). There is, of course, no occasion here to consider whether, as the Second Circuit held in *Zdanok*, seniority rights created by a contract survive its expiration.

without the consent—indeed against the wishes—of the individual employees." Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 Harv. L. Rev. 1532, 1534 (1962).

E. Authority to Enforce Individual Rights Arising From Collective Agreements Does Not License Destruction of Collective Bargaining

Section 301 assigns to courts a narrow role. They are empowered and directed to enhance respect for the collective bargaining process by enforcing its results without "reweigh[ing] the merits." *Drivers Union* v. *Riss & Co.*, 372 U.S. 517, 519 (1963); *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 585 (1960).

> "The Labor Management Relations Act of 1947 represented a far-reaching and many-faceted legislative effort to promote the achievement of industrial peace through encouragement and refinement of the collective bargaining process. It was recognized from the outset that such an effort would be purposeless unless both parties to a collective bargaining agreement could have reasonable assurance that the contract they had negotiated would be honored. Section 301(a) reflects congressional recognition of the vital importance of assuring the enforceability of such agreements." *Dowd Box Co.* v. *Courtney*, 368 U.S. 502, 509 (1962).
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> "In passing § 301, Congress was interested in the enforcement of collective bargaining contracts since it would 'promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace' (S. Rep. No. 105, 80th Cong., 1st Sess. 17). * * * The preferred method for settling disputes was declared by Congress to be '[f]inal adjustment by a method agreed upon by the parties' (§ 203(d) of the Act,

29 U.S.C. § 173(d)). 'That policy can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play' (*United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 566)." *Drake Bakeries* v. *Bakery Workers*, 370 U.S. 254, 263 (1962).

Congress did not restrict to the federal courts the obligation to honor the products of collective bargaining. To the extent that state courts lay hold they are bound to apply only federal substantive law.

> "The importance of the area which would be affected by separate systems of substantive law makes the need for a single body of federal law particularly compelling. *The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace. State law which frustrates the effort of Congress to stimulate the smooth functioning of that process thus strikes at the very core of federal labor policy.* With due regard to the many factors which bear upon competing state and federal interests in this area, *California* v. *Zook*, 336 U.S. 725, 730-731; *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230-231, we cannot but conclude that in enacting § 301 Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules." *Teamsters Local* v. *Lucas Flour Co.*, 369 U.S. 95, 104 (1962). (Emphasis added.)

It follows that in challenging and upsetting the parties' administration of the contract, the court below trod forbidden ground. Under federal law the power of the Joint Committee to dovetail could have come into controversy only if one of the contracting parties had refused to entertain or consider petitioners'

grievance and suit had been brought by the other to compel its consideration or arbitration, or if the party to whom the decision was directed had challenged the Committee's authority. In that event, a court would have been empowered to decide under the appropriately narrow federal standard whether an *ultra vires* issue was open. *Drivers Union* v. *Riss & Co.*, 372 U.S. 517, 519-520 (1963); *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 568, 569 (1960); *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960).

But that is not this case. The court below conceded that Dealers "feels bound to honor this contract" and the Joint Committee decision (R. 32). Where contracting parties agree that a grievance arises under and is governed by their contract, courts are not empowered to override. No matter how "arbitrary" or "erroneous" the parties' agreement may appear to a court, it may not be challenged, for even if the parties are "wrong" as a matter of "interpretation" their agreement would be entitled to finality as modification.

Even on the hypothesis that the Joint Committee's interpretation of Article 4, Section 5 was open to scrutiny, however, the court below clearly erred. Instead of leaving the initial employment question at large, that Section plainly assumes that the acquiring employer must and will employ the employees of the absorbed enterprise, leaving only the seniority issue to be resolved. The contrary interpretation makes wholly illusory a clause which the parties obviously intended to be enforceable. An acquiring employer could unilaterally defeat its operation by refusing to hire displaced employees, thereby pretermitting any seniority controversy completely.

In any event, the Committee's view is at least arguable. If the contracting parties had disagreed, Section 301 would have compelled submission to arbitration. *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960). Dovetailing by an arbitrator would assuredly have been immune, for courts "have no business weighing the merits of a grievance, considering whether there is equity in a claim, or determining whether there is particular language in the written instrument which will support the claim * * *." *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 568 (1960). If courts cannot substitute their interpretation for that of an arbitrator when the parties are in disagreement, *a fortiori*, they have no business substituting their judgment for that of both parties. Deference to arbitrators is designed to encourage contracting parties who cannot agree to submit to arbitration as an alternative to strike action. Encouragement of arbitration is a supplement to, not a substitute for, encouragement of settlement by agreement. There is "no room in this scheme" for "state policy limiting the solution that the parties' agreement can provide." *Oliver* case *supra*, 358 U.S., at 296; *Osfrofsky* v. *United Steelworkers of America*, 171 F. Supp. 782 (D. Md. 1959), aff'd 273 F. 2d 614 (4th Cir. 1960), cert. denied, 363 U.S. 849 (1960).

It is temerarious to find in Section 301 authority for judicial mutilation of the bargaining process (R. 33). Cf. *In re Green*, 369 U.S. 689 (1962). That Section was designed to enhance respect for collective agreements by guaranteeing enforcement against defaulters. To allow disaffected individuals or groups to stymie joint administration is to "turn the blade inward," for exercise of power to interpret, modify,

and apply collective agreements is performance, not default, of the bargaining process. To treat frustration of administration as a function of judicial enforcement is to stand federal policy on its head. The authority of the bargaining agent "acting in the collective interest of those whom it represent[s], to agree with the employer" (*Hildreth* v. *Union News Co.*, 315 F. 2d 548, 55 (6th Cir. 1963)), is established by Section 9(a) and 8(d). Exercise of that authority obviously cannot "be treated as a breach of the collective bargaining agreement." *Ibid.*

Smith v. *Evening News Ass'n.*, 371 U.S. 195, 200 (1962), suggests nothing contrary. It holds only that Section 301 does not exclude "all suits to vindicate individual employee rights arising from a collective bargaining agreement." But the only individual rights which Section 301 can be read as authorizing courts to recognize are those consistent with the statutory allocation of authority between individual and collective interests; rights which can be vindicated without injuring the collective bargaining process. Individual "rights" at odds with superior collective interests cannot be comprehended by Section 301. For the boundaries of that Section are marked by "the policy of our national labor laws." *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 446, 456 (1957); *Teamster Local* v. *Lucas Flour Co.*, 369 U.S. 95, 105 (1960). That policy forbids transforming the Section into a leviathan devouring the collective interest to satisfy individual claims. *J. I. Case Co.* v. *Labor Board*, 321 U.S. 332 (1944). Power to enforce individual contract rights is itself but an aspect of the broader policy of promoting collective bargaining.

We have shown that the authority of the exclusive representative and the nature of collective bargaining

preclude considering individual "rights of tenure" superior to the power of contracting parties to agree. Such individual "rights of tenure," therefore, cannot ground a Section 301 challenge to their agreement.

II.

THE DOVETAILING DECISION IS A PRODUCT OF FAIR REPRESENTATION

A. The Representative Was Required to Resolve the Conflict of Interest Among Its Constituents

Attack upon the Union's role in the grievance proceeding reflects total misconception of the nature and responsibilities of statutory exclusive representation. To the court below, as to the complainants (R. 3), it appeared that the only "legitimate business" the Union could have was to "espouse [the] rights" of Dealers' employees (R. 32). Exactly the opposite is true. The Union's only legitimate interest was to effectuate the collective interest. Had it represented the interest of Dealers' employees alone, or E & L's employees alone, the Union would have betrayed its statutory obligation to "the benefit of the whole." *Aeronautical Lodge* v. *Campbell*, 337 U.S. 521, 527 (1949).

The Union representatives thoroughly understood this. They recognized the conflict between the long range interest of all and the short range interest of some; they accepted responsibility to "protect people in spite of themselves" (R. 58-59). Cf. *Parks* v. *IBEW*, 314 F. 2d 886, 906 (4th Cir. 1963), cert denied 372 U.S. 976 (1963). There is no room for even the slightest suggestion that dovetailing did not express "honest desires for the protection of the interests of all members of the Union." *Campbell* case, *supra*, 337 U.S., at 529.

As the court below saw it, however, "antagonistic" interests barred the Union from taking a position adverse to Dealers' employees (R. 32). It applied a test of disqualification applicable to attorneys or common law agents who owe undivided allegiance to an individual principal. Such a test, obviously, would destroy collective bargaining completely, for it would disqualify the representative whenever a conflict exists among members of the bargaining unit. Since some conflict almost invariably exists, or at least could be invented, such a test would enable a disgruntled individual or group absolutely to paralyze the bargaining agent. That is exactly the source of frustration the majority rule principle cut off. If majority rule did not prevent minorities from thwarting Union control of grievance adjustment "collective bargaining would have little substance, for what was made collectively could be promptly unmade individually." *Telegraphers* v. *Ry. Express Agency*, 321 U.S. 342, 346 (1944).

Section 9(a) repudiates common law agency concepts: "in placing a non-consisting minority under the bargaining responsibilities of an agent selected by a majority of the workers, Congress has discarded common law doctrines of agency." *Brooks* v. *Labor Board*, 348 U.S. 96, 103 (1954). "The question whether the collective agent has authority * * * does not turn on technical agency rules such as apply in the simple, individualistic situation where P deals with T through A about the sale of Blackacre." *Elgin, J. & E. R. Co.* v. *Burley*, 326 U.S. 801, 803 (1946). Consequently, "[w]hen the employee and the union are in disagreement [the Union is not necessarily disqualified;] the question is * * * the extent to which the one may conclude the other." *Employees* v. *Westinghouse Corp.*,

348 U.S. 437, 439 (1955). *Burley* teaches that the employee is empowered to conclude the exclusive representative only in the area of fully accrued and vested individual rights. On all bargainable issues, the representative necessarily concludes the employee.

This result follows from Congress' substitution for inapposite agency concepts the political analogy which casts the representative democratically chosen by a majority in the role of legislator with power, by virtue of its status, "both to create and to restrict the rights of those whom it represents." *Steele* case, *supra*, 323 U.S., at 204. The very essence of the statutory function of such a representative is to mediate and balance the conflicting interests of individuals and groups in the appropriate unit, to promote the welfare of all. During the contract term that function is frequently, if not always, performed through the grievance procedure because the bargaining agent's resolution cannot be effectuated without the employer's consent and approval. The employer may well be and generally is neutral in such controversies, leaving the burden of decision with the employees' bargaining agent (Sayles, *Seniority: An Internal Union Problem*, 30 Harv. Bus. Rev. 55, 56 (1952); Kahn, *Seniority Problems in Business Mergers*, 8 Ind. & Lab. Rel. Rev. 361, 362 (1955)), but his participation and consent is nonetheless required to assure enforcement.

> "When the interests of several groups conflict, or future needs run contrary to present desires, or when the individual's claim endangers group interests, the union's function is to resolve the competition by reaching an accommodation or striking a balance. . . . A large part of the daily grist of union business is resolving differences among employees poorly camouflaged as disputes

with the employer." Cox, *Rights Under A Labor Agreement*, 69 Harv. L. Rev. 601, 626-627 (1956).

The court below completely missed the point by considering the proceeding an arbitration of vested rights (R. 32). In actuality, its statutory purpose was to resolve legislatively the clash of interest between Dealers' and E & L employees. Seen in that perspective, the charge that Dealers' employees were victims of substantive or procedural unfairness is footless.

The cases teach that individuals and groups have no right whatever to participate in any phase of the collective bargaining process which looks to the future.[18] The power which Section 9(a) reserves to individuals to adjust their own "grievances," must be read in the *Burley* sense, as restricted to retroactive claims, pp. 22-24, *supra;* otherwise, the Act would be self-defeating.

> "[T]he employee has no standing to participate in thrashing out the interpretation of an existing employment standard to the extent that it purports to settle the future scope of a disputed existing right. Insofar as it operates prospectively, the interpretation of a standard, no less than its formulation, is within the exclusive province of the representative, for the interpretative process is a policy-making function which calls for the imaginative and informed choice of available alternatives in construing an agreement. Whether

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[18] *J. I. Case Co.* v. *Labor Board*, 321 U.S. 332 (1944); *Medo Corp.* v. *Labor Board*, 321 U.S. 678, 684 (1944); *May Stores Co.* v. *Labor Board*, 326 U.S. 376, 384 (1945); *Labor Board* v. *Crompton Mills*, 337 U.S. 217 (1949); *Telegraphers* v. *Ry. Express Agency*, 321 U.S. 342 (1944).

> the result is termed an interpretation or a change of the agreement, its essence is to imbue it with a new meaning to which the employees are bound in the future."[19]

Therefore, assuming, *arguendo*, that individuals or groups in immediate competition with grievants, who stand to lose by adjustment in grievants' favor, are entitled under Section 9(a) to the same right as grievants, Dealers' employees would not have had standing as of right in the grievance proceeding. Grant could not have deprived any Dealers' employee of accrued earnings. Consequently, under federal law, Dealers' employees had no more vested interest in denial than E & L employees had in allowance. See Cox, *Rights Under A Labor Agreement*, 69 Harv. L. Rev. 601, 633 (1956). Thus, the complaints that respondents were "misled" as to the position Priddy would take (R. 28); that they relied on the Local Union to represent and uphold their interests against petitioners (*ibid.*); and that the stewards who represented respondent in Detroit were not "prepared or qualified to make a presentation" (R. 32), pleaded no breach of legal duty. *Vis-a-vis* both groups the Local Union and its representatives were in the position of a Congressman or Senator. Since employee participation in the legislative grievance process is merely a matter of grace, inadequate notice can violate no right and disappointment with legislative representation is not legal injury.

"The bargaining agent is * * * not required to consult with the individual members or give them notice

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[19] Dunau, *Employee Participation in the Grievance Aspect of Collective Bargaining*, 50 Col. L. Rev. 730, 748, 755 (1950); Cf. Cox, *Rights Under A Labor Agreement*, 69 Harv. L. Rev. 601, 620 *et seq.*

of contemplated contractual actions within the scope of its authority. It has the authority to bind its principal, if it acts within the statutory provisions." *McMullans* v. *Kansas, Oklahoma & Gulf Ry. Co.*, 229 F. 2d 50, 56 (10th Cir. 1956), cert. denied 351 U.S. 918 (1956); *Outland* v. *C.A.B.*, 284 F. 2d 224, 226 (D.C. Cir. 1960); *Fagan* v. *Pennsylvania R. Co.*, 173 F. Supp. 465, 473 (M.D. Pa. 1959); *Coley* v. *Atlantic Coast Line R.R.*, 221 N.C. 66, 19 S.E. 2d 124, 126 (1942). To vitiate an agreement for lack of notice "would becloud collective bargaining with an invitation to the use of evasive tactics rather than clarity and purpose and would place the courts in constant attendance at the bargaining table * * *." *Napier* v. *System Federation No. 91*, 127 F. Supp. 874, 891 (W.D. Ky. 1955). Even if there had been a "misrepresentation"[20] of the position Local 89 would take, the validity of the Committee's Agreement would not have been affected. *Durandetti* v. *Chrysler Corp.*, 195 F. Supp. 653, 655-656 (E.D. Mich. 1961).

B. Dovetailing Was Within the Scope of the Representative's Discretion

In the *Huffman* case, *supra*, this Court stated that the (345 U.S., at 337, 338, 339):

> "statutory obligation to represent all members of an appropriate unit requires [the bargaining agent] to make an honest effort to serve the in-

[20] Actually, the insinuation of deception against Local 89's officers is as lacking in factual basis as the simile in which it is cast (R. 28). Those officers consistently explained both to Dealers' and to E & L's employees that dovetailing would depend on whether or not there was a merger or absorption of E & L's business by Dealers (R. 46, 57). As far as the record shows, their predictions were honestly based upon "current available information" (R. 46, 47, 49-50, 57).

terest of all of those members, without hostility to any. * * * [Negotiators have] discretion to make such concessions and accept such advantages as, in the light of all relevant considerations, they believe will best serve the interests of the parties represented * * *. Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion. * * *

"The National Labor Relations Act, as amended, gives a bargaining representative not only wide responsibility but authority to meet that responsibility."

That this standard sustains the dovetailing decision is scarcely to be doubted.

"The merger of two companies like the consolidation of once-separate operations into a single plant often gives rise to sharp conflicts of interest in working out the relative seniority rights of two once separate groups of employees but the courts have invariably—and wisely—refused to become entangled in the merits of a conscientiously negotiated solution." Cox, *The Duty of Fair Representation*, 2 Vill. L. Rev. 151, 161 (1957).

Of course whenever job opportunities or security are diminished, no solution can satisfy all of the employees. But, "it is not violative of federal law that a union not satisfy all employees or that it improperly balance the rights and obligations of the various groups

it represents." *Cunningham* v. *Erie Railroad Company*, 266 F. 2d 411, 417 (2d Cir. 1959). Dovetailing "on the basis of each employee's length of service with his original employer * * *" is generally, indeed, considered the most equitable solution. Kahn, *Seniority Problems in Business Mergers*, 8 Ind. & Lab. Rel. Rev. 361, 378 (1955); *Kent* v. *Civil Aeronautics Board*, 204 F. 2d 263, 266 (2d Cir. 1953), cert. denied, 346 U.S. 826 (1953); *Outland* v. *Civil Aeronautics Board*, 284 F. 2d 224, 226 (D.C. Cir. 1960). It is as common as merger and absorption are widespread.[21]

Dovetailing does not become discriminatory because employees of one employer have longer service than employees of the other. *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 337-339 (1953). "The seniority principle necessarily adversely affects some employees, particularly the younger employees." *McMullans* v. *Kansas, Oklahoma and Gulf Ry. Co.*, 229 F. 2d 50, 53 (10th Cir. 1956), cert. denied, 351 U.S. 918 (1956).

Both the National Labor Relations Board and the courts hold that dovetailing is within the ambit of the exclusive representative's statutory authority and discretion. *NLRB* v. *Wheland Company*, 271 F. 2d 122, 124-125 (6th Cir. 1959); *Holman* v. *Industrial Stamp-*

[21] Where, as in the transportation industry, "there is frequently consolidation and pooling of operations" the "practice * * * is generally to protect the employees, to the extent possible, against loss of seniority as a result of the merger." 2 BNA, COLLECTIVE BARGAINING-NEGOTIATIONS AND CONTRACTS (5-26-61), 75:201. "Every industry with seniority practices has encountered seniority integration disputes at least sporadically, while some, especially in transportation, have been plagued by them. Although no satisfactory aggregate statistics are available on the frequency or magnitude of these disputes, they constitute an important industrial relations problem." Kahn, *op. cit., supra*, at pp. 362, 363.

ing Co., 142 F. Supp. 215, 218 (E.D. Mich., 1956); Administrative Ruling of the General Counsel, Case No. SR-1973, May 17, 1962, 50 LRRM 1360.[22]

The court below considered dovetailing impermissible because it enhances "the influence of the union" (R. 32). But encouragement of unionization by enhancement of its influence is both object and consequence of compulsory collective bargaining. "The truth is that the union is a service agency that probably encourages membership whenever it does its job well." *Teamsters Local* v. *Labor Board*, 365 U.S. 667, 675-676 (1961). Even otherwise forbidden discrimination which manifestly encourages union membership is allowed, if it is incident to protection of the group interest in efficient collective bargaining. Superseniority for union stewards is not forbidden discrimination because:

> "they are in a special relation to collective bargaining for the benefit of the whole union. To [favor] them as such is * * * but a due regard of union interests * * *." *Aeronautical Lodge* v. *Campbell*, 337 U.S. 521, 527 (1949).

To contravene federal standards, a decision to dovetail would have to reflect malice against one group or irrational preference for the other. To upset dovetailing, "arbitrariness * * * of the bad faith kind, * * *

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[22] Accord: *Colbert* v. *Brotherhood of Railroad Trainmen*, 206 F. 2d 9 (9th Cir. 1953), cert. denied 346 U.S. 931 (1954), rehearing denied 347 U.S. 924; *Fagan* v. *Pennsylvania R. Co.*, 173 F. Supp. 465 (M.D. Pa. 1959); *Brotherhood* v. *Girard Lodge*, 384 Pa. 248, 120 A. 2d 523, 528 (1956), cert. denied 351 U.S. 985; *Walker* v. *Penn-Reading Seashore Lines*, 142 N.J. Eq. 588, 61 A. 2d 453, 462-463 (1948); *Pratt* v. *Wilson Trucking Co.*, 214 Va. 385, 104 S.E. 2d 915 (1958).

[s]omething akin to factual malice" (*Cunningham* v. *Erie Railroad Company*, 266 F. 2d 411, 417 (1959)); "an intent to hostilely discriminate against a portion of the union's membership" (*Hardcastle* v. *Western Greyhound Lines*, 303 F. 2d 182, 185 (9th Cir., 1962), cert. denied 371 U.S. 920 (1962)) must be shown. There is neither allegation, evidence nor finding of that here.

On the contrary, Priddy thought he could predict the result "on the basis of prior rulings on matters of this nature" (R. 28). Obviously, therefore, the decision constituted application of a general principle or policy, not a discriminatory innovation. Cf. *Pekar* v. *Local 181, Brewery Workers*, 311 F. 2d 628 (6th Cir. 1962), cert. denied 373 U.S. 912 (1963). On the findings of the court below (R. 29), Dealers' employees were disadvantaged only because "E & L's Louisville Terminal evidently is older than that of Dealers [which] means that by and large E & L employees will have the greater seniority in the event the merger of seniority boards stands." Adverse consequences of "the conventional sequence of seniority" (*Campbell* case, *supra*, 337 U.S., at 524) are not indicia of discrimination.

Demonstration that dovetailing was the product of fair representation shows that nullification is in irreconcilable conflict with federal policy and therefore cannot possibly stand. We now undertake to show, however, that insofar as the complaint charged the bargaining agent with unfairness, the Kentucky courts were powerless *ab initio* to entertain it, for the federal duty of fair representation occupies that field and its enforcement is not within the province of state courts.

III.

THE FEDERAL DUTY OF FAIR REPRESENTATION OCCUPIES THE FIELD TO THE EXCLUSION OF STATE LAW AND STATE COURTS

The court below erroneously conceived the pre-empted area as limited to discrimination based on union activity, on the theory that only such discrimination can produce an unfair labor practice (R. 33). It thereby overlooked both the grant of power to the exclusive representative to resolve conflicts of interest among its constituents and the correlative duty of fair representation, with their "inescapable implication of exclusiveness." *Guss* v. *Utah Labor Board*, 353 U.S. 1, 10 (1957).

> "Collective bargaining is a continuing process. Among other things, it involves day-to-day adjustments in the contract, . . . resolution of new problems not covered by existing agreements, and the protection of employee rights already secured by contract. The bargaining representative can no more unfairly discriminate in carrying out these functions than it can in negotiating a collective agreement. * * *" *Conley* v. *Gibson*, 355 U.S. 41, 46 (1957).

The duty of fair representation, of course, is not limited to non-discrimination for union membership or activity. Its preemptive impact upon state power does not turn, as we shall show, on the as yet undecided question whether violation is an unfair labor practice.[23] Cf. Cox, *The Duty of Fair Representation*, 2 Vill. L.

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[23] "A majority of the Board has recently reached the novel conclusion that, under the general principle laid down in *Steele* * * * a union violates the Act if it seeks unfair discrimination, even if that discrimination is not based on union membership or activity. *Matter of Miranda Fuel Company*, 140 NLRB No. 7, 51 LRRM 1584 (1962)." *NLRB* v. *Local 294, Teamsters*, 53 LRRM 2248, 2250, n. 4 (2d Cir., May 21, 1963); *Plumbers' Union* v. *Borden*, 373 U.S. 690, 696, n. 7 (1963).

Rev. 151, 172 (1957); *Holman* v. *Industrial Stamping Co.*, 344 Mich. 235, 74 N.W. 2d 322, 333 (1955).

The very pendency of that arguable question suffices, however, to show that, at least at this time, there can be no room for state intrusion. *Marine Engineers* v. *Interlake Co.*, 370 U.S. 173 (1963); *Incres Steamship Co.* v. *International Maritime Workers U.*, 372 U.S. 24, 27 (1963); *SanDiego Unions* v. *Garmon*, 359 U.S. 236, 246 (1959). In asserting jurisdiction over the relationship between the exclusive bargaining agent and its constituents, and in bringing concepts derived from state law to bear on that relationship, the court below invaded an exclusively federal domain.

That only federal law can be permitted to govern the scope and nature of the duty of the exclusive bargaining agent, as such, to its constituents would seem to follow from the fact that their relationship is a product of exclusive and preempting federal law. If a single uniform body of substantive law is required even in the field of contract enforcement (*Dowd Box Co.* v. *Courtney*, 368 U.S. 502 (1962)), *a fortiori* is it required in the area of obligations owed by the collective bargaining agent to its constituents. Governance of the relationship inextricably involves and decisively shapes the capacity of the exclusive representative to perform its federal functions. So interrelated is the duty to represent fairly with exclusive power to bind constituents that a uniform body of federal law is not enough; if federal policy is to prevail, its enforcement can be entrusted only to federal tribunals.

In this respect the federal duty to observe contracts differs decisively from the duty to provide fair representation. The former applies to employers as well as to bargaining agents. As this Court demonstrated in

Dowd Box, that duty was superimposed by Congress upon a pre-existing body of state law which Congress fundamentally approved and desired to continue. Congress considered the duty inappropriate for enforcement by the National Labor Relations Board. Thus, "the purpose of conferring jurisdiction upon the federal courts was not to displace, but to supplement, the thoroughly considered jurisdiction of the courts of the various States over contracts made by labor organizations." 368 U.S., at 511.

Similarly, the duty of bargaining agents to provide fair representation differs from the contractual duty of unions to members. *Machinists* v. *Gonzales,* 356 U.S. 617 (1958). The "protection of union members in their rights as members" under constitutions and bylaws is "traditional" state court jurisdiction (356 U.S., at 62), and not "within the Board's competence." *Plumbers' Union* v. *Borden,* 373 U.S. 690, 697 (1963).

In contrast, the power of exclusive representation, from which the duty of fairness springs, displaced antithetical state common law concepts which Congress disapproved. The Board is empowered to and does police performance of that duty through its power over certifications. *Larus & Brother Co.,* 62 NLRB 1075 (1945); *Hughes Tool Co.* v. *NLRB,* 147 F. 2d 69, 74 (5th Cir., 1945). Consequently, whether enforcement by injunction is ultimately held to be the exclusive province of the Board, the exclusive province of the federal courts, or the concurrent province of both, state tribunals must be excluded. There is no more reason to believe that Congress would have welcomed state court enforcement of the bargaining agent's unique federal duty than it welcomed state court enforcement of its unique correlative right.

IV.

FEDERAL SUPREMACY MUST BE EFFECTIVELY PROTECTED

In *Oliver*, the Supremacy Clause was violated by invocation of a statute of "broad general application."[24] Here it is violated by invocation of common law labor relations policy. Since the court, as policy maker, is an arm of the State (*Shelley* v. *Kraemer*, 334 U.S. 1 (1948); *Barrows* v. *Jackson*, 346 U.S. 249 (1953)); the conflict with federal policy is of constitutional dimensions. *Capital Service* v. *Labor Board*, 347 U.S. 501 (1954); *In re Green*, 369 U.S. 689 (1962); *Plumbers Union* v. *Borden*, 373 U.S. 690 (1963); *Iron Workers* v. *Perko*, 373 U.S. 701 (1963); *Construction Laborers* v. *Curry*, 371 U.S. 542 (1963); *Kesler* v. *Dept. of Public Safety*, 369 U.S. 153, 178, n. 13, (1962).

Disclaimer of intention "to exercise any jurisdiction in the field of national labor policy" (R. 33) obviously does not immunize encroachment. Disclaimer rather attests blindness to the elements of which national labor policy is composed. This case is certainly the classic illustration of Professor Summers' observation that many state courts "have not proven themselves hospitable to, or even aware of, national labor policy." Labor Law Decisions of the Supreme Court, 1961 Term, in ABA Section of Labor Relations Law Proceedings 51, 63 (1962). The Sixth Circuit epitomized the consequence in *Union News Co.* v. *Hildreth*, 295 F. 2d 658, 664 (6th Cir. 1961):

> "Unless such bilateral decisions, made in good faith and after unhurried consideration between a Union and an employer, be sustained in court, the bargaining process is a mirage, without the efficacy

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[24] *San Diego Unions* v. *Garmon*, 359 U.S. 236, 244 (1959).

contemplated by the philosophy of the law which makes its use compulsory."

The attack upon the Joint Committee's decision "strikes at the very core of federal labor policy." *Teamsters Local* v. *Lucas Flour Co.*, 369 U.S. 95, 104 (1962).

This case highlights the danger to collective bargaining which inheres in assertion of jurisdiction by state courts steeped in common law traditions and unfamiliar with the premises of the federal Act. For almost two years Kentucky will have thwarted the goals of the federal scheme and deprived petitioners of its benefits. This Court should make it clear that the preempted area is not narrowed by Section 301 and that state courts may not intrude upon either the relationship between an exclusive bargaining agent and its constituents or the collective bargaining process.

CONCLUSION

It is respectfully submitted that the judgment below should be reversed.

H. Solomon Horen
Kentucky Home Life Building
Louisville, Kentucky.

William S. Zeman
1 Grand Street
Hartford, Connecticut

Mozart G. Ratner
1411 K Street, N. W.
Washington, D. C.

Counsel for Petitioners

August, 1963

APPENDIX

Labor Management Relations Act, 1947, 61 Stat. 136. 29 U.S.C. 141, et seq.

Sec. 1. • • •

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

• • •

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Sec. 2. When used in this Act—

• • • •

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise • • •

• • •

(5) The term "labor organization" means any organization . . . in which employees participate and which exists for the purpose, in whole or in part, of dealing with em-

ployers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

* * *

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

* * *

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *.

* * *

Sec. 8(d). For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder * * *. The duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. * * *

Sec. 9(a). Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in re-

spect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

Sec. 203(d). Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. * * *

Sec. 301(a). Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1963

No. 17

WALTER HUMPHREY, Etc., Et Al., - Petitioners,

versus

C. W. MOORE, Etc., Et Al.,
GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION No. 89,
and
DEALERS TRANSPORT COMPANY, - Respondents.

ON A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

BRIEF FOR RESPONDENT, DEALERS TRANSPORT COMPANY.

NEWELL N. FOWLER,
FOWLER & FORTAS,
44 North Second Street,
Memphis, Tennessee,
Counsel for Respondent, Dealers Transport Company.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

IN THE

Supreme Court of the United States

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No. 17

WALTER HUMPHREY, Etc., Et Al., - *Petitioners,*

v.

C. W. MOORE, Etc., Et Al.,
GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION No. 89, and
DEALERS TRANSPORT COMPANY, - - *Respondents.*

ON A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

BRIEF FOR RESPONDENT, DEALERS TRANSPORT COMPANY.

QUESTION PRESENTED.

Whether employee-members of a labor union may seek relief against their union and their employer in a state court action in which they challenge an award to consolidate seniority lists of two employers on the grounds that the award is in violation of natural justice and of their rights under the contract.

STATEMENT OF CASE.

This Respondent, Dealers Transport Company, adopts as its own, the statement of the facts of the case as reflected by Petitioner's brief (R. 3-11) and in the findings of facts of the Court of Appeals of Kentucky (R. 25-34) as reported at 356 S. W. 2d 241, with the following additions and observations:

Although the record reflects that certain employees of E & L filed a grievance for the purpose of determining their seniority status after it was announced E & L was quitting business in Louisville, Kentucky, no employees of Dealers Transport Company filed a grievance. The record reflects that Dealers' employees after being informed that E & L's employees were attempting through union procedure to replace them at Dealers relied entirely on the representations of the union president, Preddy, who had told them that they had no reason to fear and that the grievance of the E & L's employees would not be considered.

SUMMARY OF ARGUMENT.

We agree with Mr. Justice Black in his dissenting opinion in *Smith* v. *Evening News*, 371 U. S. 195, where he said:

> "Finally, since the Court is deciding that this type of action can be brought to vindicate workers' rights, I think it should also decide clearly and unequivocally whether an employee injured by the discrimination of either his employer or union can file and prosecute his own lawsuit in his own way. I cannot believe that Congress intended by the

National Labor Relations Act either as originally passed or as amended by Section 301 to take away rights to sue which individuals have freely exercised in this country at least since the concept of due process of law became recognized as a guiding principle in our jurisprudence. And surely the Labor Act was not intended to relegate workers with lawsuits to the status of wards either of companies or unions."

The Court below put it this way (R. 32-33):

"Under these particular circumstances the solution of the controversy under the cloak of a spurious 'grievance' against a virtually disinterested employer simply will not bear careful scrutiny, and when we view the erroneous decision of the Detroit committee against such a background we judge it as having been arbitrary and violative of natural justice. Any other conclusion would reduce these employees to the status of pawns instead of free men. So, even though it be considered that the Detroit ruling was made pursuant to Article 7, Section 2 (d) of the contract, providing for arbitration of all questions of contract interpretation, it still cannot stand."

ARGUMENT.

Since the institution of this lawsuit, Dealers has maintained a neutral position. Dealers complied to the best of its ability to the award of the Joint Conference Committee as of October, 1961. This position of neutrality was presented in the Trial Court, in the Appellate Court and will be maintained in this Court. The Kentucky Court of Appeals found (R. 31-32):

> "Before proceeding further let us clarify the position of Dealers, the employer, in this matter. It is neutral. Its (fol. 92) relations with its employees have been highly satisfactory, and the year ending July 1, 1961, was its best year to date for efficiency as to accidents, cargo-damage, and the like. It has recognized all along that the real controversy here was within the union itself. It feels bound to honor the contract and the 'decisions of all agents to the employees who legally work for us.' At Detroit it took the position that it was up to the union to decide what to do with the employees. In its November 25 letters to the 96 displaced employees it specifically advised them that their dismissal was 'necessary due to Union action whereby the decision was rendered' by the Detroit committee requiring absorption of the E & L seniority list. It seems clear that Dealers was scarcely a real party in interest to the grievance proceeding. The actual antagonists were the E & L men on the one hand the Dealers men on the other, all union members."

Dealers feels that this position of neutrality does not absolve itself of its obligations to present some factual argument in order to clarify its position. It feels that in the interest of its present and future employees that the issues raised in the dissenting opinion of *Smith* v. *Evening News* (cited above) should be answered by this Court. Since the inception of this case Dealers has been disturbed as to its rights and the rights of its employees under the grievance procedure, Article 7, Section 2 (R. 11-12), of its contract with the Union. Nothing in the record indicates that Dealers

was aware of the fact that the Union intended to take a position that Dealers' employees and E & L employees were to be sandwiched. Had Dealers been given such notice prior to the Joint Conference meeting in Detroit, its position could possibly have been changed to the extent that it would have failed to agree to the sandwiching proposal and insisted on going to the final step under Section 7 of the grievance procedure and insisted on an arbitration of the dispute.

The Joint Committee based its decision to sandwich the two employee groups on Article 4, Subsections 4 and 5 of the Agreement (R. 59-60). This decision is based upon the statement of the Joint Committee as "request of employees R. L. Lewis and Howard Baker on behalf of themselves and other former employees of E & L Transport Co. of Ky. as to their seniority rights with Dealers Transport Co. because of the *discontinuance* of operations in Louisville by E & L Transport Co. of Ky." (Emphasis supplied.) Dealers therefore respectfully raises the question as to the validity of the interpretation by the Joint Board of Article 4, Sections 4 and 5, of the Agreement. Section 5 of Article 4 provides (R. 10):

> "In the event that the Employer absorbs the business of another private, contract or common carrier, or is a party to a merger of lines, the seniority of the employees absorbed or affected thereby shall be determined by mutual agreement between the Employer and the Unions involved. Any controversy with respect to such matter shall be submitted to the joint grievance procedure (Article 7)."

The lower court held there was no merger or absorption of the business of E & L by Dealers (R. 26). If this holding is correct the Joint Board had no authority under Article 4, Subsection 5, to decree a merger of the two seniority lists.

We are not impressed with the theory advanced by Petitioner that the Joint Board had authority to revise the contract in compliance with its decision. This Joint Board did not negotiate the contract. It was negotiated by the National Truckaway and Driveaway Conference consisting of representatives of management members of the Conference and with the International Union. We question therefore the authority of the Joint Grievance Committee to "legislate" as insisted by the Petitioner.

It would seem to follow that if the decision of the Joint Grievance Committee bypasses the final step of arbitration under Article 7, Subsection 2, of the Agreement that Dealers' employees, having been misled by the local Union President, have been denied the right to be heard. This Court has held in *General Drivers, Warehousemen & Helpers Local 89* v. *Riss & Company, Inc.* (372 U. S. 517, 519-520) that no action will lie under Section 301 of the Taft-Hartley Act to enforce an award where it is not shown that the award is not final and binding under the contract. It would seem from this doctrine that the only conclusion to be reached would be that the decision of the Joint Committee, although unanimous, was not a final decision and that the Dealers' employees have been denied their

right to the final arbitration step. The Court in *Riss* said:

> "Of course, if it should be decided after trial that the grievance award involved here is not final and binding under the collective bargaining agreement, no action under Section 301 to enforce it will lie. Then, should petitioner seek to pursue the action as a Section 301 suit for breach of contract there may have to be considered questions unresolved by our prior decisions."

It should be noted that the petitioner in the *Riss* case is the petitioner in the case at bar.

It would appear that since the President of the local Union had been fully advised that the employees of Dealers were challenging the grievance of E & L employees under the terms of the agreement it would have been his obligation to have deadlocked the Joint Committee and thereby given Dealers' employees an opportunity to obtain an interpretation through an impartial arbitrator as to the seniority provisions of the contract. This raises the suggestion that the failure of the Union President to protect the legal rights of his Dealer employee members constituted an ultra-vires act on his part. Under these circumstances, we suggest that since the Dealers' employees have been denied the right to impartial arbitration they clearly have a standing in Court to enforce these rights. Dealers suggest that any decision to the contrary would not be in conformity with the holdings of this Court in *United Steel Workers* v. *American Manufacturing Co.* 363 U. S. 564, and *United Steel Workers* v. *Warrior &*

Gulf Nav. Co., 363 U. S. 574. In Dealers' efforts to maintain a position of neutrality we do not deem it proper that we should attempt to analyze the arguments as set out in petitioners' brief other than to suggest that it sets out admirably petitioners' position.

CONCLUSION.

We submit that the only question here is whether or not Dealers' employees have the right under Section 301 of the Taft-Hartley Act to test an award of the Joint Grievance Committee in the absence of any final decision through the arbitration procedure under the Agreement.

Respectfully submitted,

NEWELL N. FOWLER,
FOWLER & FORTAS,
44 North Second Street,
Memphis, Tennessee,
Attorneys for Respondent,
Dealers Transport Company.

September, 1963.

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IN THE

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GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION No. 89, and
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AND

No. 18

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION No. 89, - Petitioner,

versus

C. W. MOORE, Et Al., - - - - Respondents.

BRIEF FOR RESPONDENTS, C. W. MOORE, ET AL.

JOHN Y. BROWN,
BROWN, SLEDD & McCANN,
601 Security Trust Building,
Lexington, Kentucky,
Attorneys for Respondents.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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IN THE

Supreme Court of the United States

October Term, 1963

No. 17

WALTER HUMPHREY, Etc., Et Al., - *Petitioners,*

v.

C. W. MOORE, Etc., Et Al.,
GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION No. 89, and
DEALERS TRANSPORT COMPANY, - *Respondents.*

AND

No. 18

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION No. 89, - *Petitioner,*

v.

C. W. MOORE, Et Al., - - - *Respondents.*

BRIEF FOR RESPONDENTS, C. W. MOORE, ET AL.

SECTION I.

These respondents accept the statement of opinions below and jurisdiction.

SECTION II.

These respondents accept the statement of statute involved, except as follows:

Section 8(d) is not complete as quoted in petitioners' brief and its import cannot be ascertained from the extracted portion. This portion must be considered:

> ". . . where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract. . . ."

SECTION III.

QUESTIONS PRESENTED.

(1) Whether an individual or group of employees has the right to maintain an action in state court to enforce their rights under an existing collective bargaining agreement?

(2) Whether the decision of the Joint Conference Committee, providing that employees of another company should be "sandwiched in" on the seniority board with respondent employees, the effect of which was to deny respondents their jobs, was a decision that could be enjoined by state court action for the reasons: (1) It was not an issue under the collective bargaining agreement which was to be arbitrated, and (2) even if it was a decision to be arbitrated under that agreement, the decision was not reached after fair representation of the respondents by their bargaining unit, and was arbitrary, capricious, unfair and thereby in violation of respondents' contractual rights.

SECTION IV.

STATEMENT.

These respondents accept the statement as presented by the petitioners, but with the additions and corrections as hereinafter indicated.

(a) The multi employer unit and its agreement. These respondents ask the court to also consider Article I, Section (c), "When the employer needs additional men he shall give the Local Union equal opportunity with all other sources to provide suitable applicants, but the Employer shall not be required to hire those referred by the Local Union."

Article IV, Section 1, ". . . . terminal seniority shall prevail at all times except as provided for in Article IV, Section 6, Subsection (b)2."

Article IV, Section 6, Subsection (b)2 provides that when a branch terminal divisional operation is closed or partially closed, the employees at that partially closed branch terminal shall have "the right to transfer to the branch terminal divisional operation into which the work was transferred, if regular work is there available. Such employee, however, shall go to the bottom of the seniority board and shall have a right of job selection only in accordance with the seniority at such terminal."

Article VII, Section 2(a), "Disputes shall first be taken up between the Employer and the Local Union involved. If the parties are unable to settle the dispute, the same shall then go to the Local Joint Committee."

(b) Application of the agreement of E & L to the absorption of E & L routes by Dealers. This statement itself states there was an absorption of E & L by Dealers, whereas it is the belief and contention of these respondents that there was no absorption of the business of E & L by Dealers. The sole basis of such a statement is a reliance on the statement of Mack Snites, wherein he stated a certain portion of the business of E & L was absorbed by Dealers (R. 44, also referred to on page 8 of Petitioners' Brief). It is the contention of these respondents that that statement is taken out of context and that an accurate statement of what was actually done in this regard is found at R. 42. The facts are that Dealers and E & L could not both continue to operate at Louisville and by agreement reached between the companies, the plan to consolidate the respective operations geographically, Dealers took over certain secondary runs formerly held by E & L. Dealers did not take over any equipment or any business of E & L. There was a payment of from $3500.00 to $4500.00 for all of the business taken over by Dealers from E & L. As stated by Mr. Snites this purchase price was only a nominal price based generally upon the cost of obtaining transfer of the secondary authority at the Louisville terminal.

Mr. Snites, stated (R. 42):

> "The purchase price is naturally a nominal price which is placed on operating authority and it usually represents that amount of money which it takes to obtain the authority. In this case it was either $3500.00 or $4500.00."

(c) Proceedings below. These respondents have no particular disagreement with the statements as found in this section of petitioners' brief, except that it is our opinion that a better understanding of the Court of Appeals decision will be reached by reading that opinion, rather than the quotes out of context as stated on page 10 and 11 of the petitioners' brief.

SECTION V.

ARGUMENT.

(a) Whether an Individual or Group of Employees Has the Right to Maintain an Action in State Court to Enforce Their Rights Under an Existing Collective Bargaining Agreement?

This is a suit originating in the state courts of the state of Kentucky filed by C. W. Moore on his own behalf and on behalf of other members of the class against his local union and against Dealers Transport Company, his employer. The respondents, C. W. Moore, *et al.*, were all employees of Dealers Transport Company at the time this action was filed on November 18, 1961. They were all members of Local Union No. 89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and this action was brought for an injunction to prevent the Union from denying to them their rights under a collective bargaining agreement known as the Automobile Carrier Truckaway Agreement, effective March 1, 1961 through February 29, 1964. While Dealers Transport Company was made a party to the action, there was and is no dispute between these re-

spondents and their employer, Dealers Transport Company, and Dealers has taken the position that it is a nominal party to this suit, rather than a real party in controversy.

This, therefore, is a suit by individual members of a Union against the Union for rights under an existing collective bargaining agreement. This court has admittedly had difficulty in drawing the line between state and federal court jurisdiction particularly since passage of the Taft-Hartley Act. The line, however, is drawn to permit state courts jurisdiction in a case such as this one for enforcement of a right under an existing contract by an employee against his labor union. Any ruling to the contrary would deprive individual citizens of their right to prosecute in local courts a claim under a contract. In view of the massive size, power and proportions now achieved by some labor unions and by some employers, this right is vital. This philosophy is stated by Justice Black in his separate opinion in the case of Smith v. Evening News Association, 9 Law Ed. 2d 246, 83 S. Ct. ——, 371 U. S. 195, decided December 10, 1962, wherein he stated:

> "Finally, since the court is deciding that this type of action can be brought to vindicate workers' rights, I think it should also decide clearly and unequivocally whether an employee injured by the discrimination of either his employer or union can file and prosecute his own law suit in his own way. I cannot believe that Congress intended by the National Labor Relations Act either as originally passed or as amended by Section 301 to take away

rights to sue which individuals have freely exercised in this country at least since the concept of due process of law became recognized as a guiding principle in our jurisprudence. And surely the Labor Act was not intended to relegate workers with law suits to the status of wards either of companies or unions."

If the ruling of the Joint Conference Committee had been allowed to stand—and except for the action of the Court of Appeals of Kentucky it would have been allowed to stand—two-thirds of the employees of Dealers Transport would have lost their jobs with no recourse for the wrong done them, not by their employer, but by their union. The Dealers' employees were satisfied with their employer and the employer was satisfied with its employees. It is a reasonable assumption that it was the very efficiency of Dealers' employees that caused Ford to select that company for its business, which resulted in E & L abandoning the Louisville area. Unless these employees have access to court procedure, we have here a wrong without a remedy and, as Mr. Justice Black said in his dissenting opinion, we have workers "relegated to the status of wards of the companies and unions."

The basic issue here involved is whether a decision completely inequitable can be allowed to stand because the individual wronged has no court in which he can seek relief. The rights of individuals who are members of a labor union should not be lightly disregarded. It should further be recognized that there are instances where the interest of the union and the union leader-

ship runs counter to the rights of individual workers. Such is the situation in this case. The bargaining unit for the employees of Dealers Transport supposedly was Local 89, but we find Local 89 representing not the employees of Dealers but the employees of another company, E & L, against the interest of the employees of Dealers. Respondents have no conflict with their employer. Their conflict is with their own union, which, by its arbitrary decision, has deprived them of their jobs. They had no bargaining unit representing them at Detroit before the Joint Conference Committee. Their bargaining unit was representing no employees of their employer, and their bargaining agent was seeking to take away their jobs.

In addition to the injustice with which they were confronted, they were in the anomalous situation of being forced to pay dues and assessments to employ the multitude of counsel now used against them both in the courts of Kentucky and before this court. By what stretch of the imagination can one reach the conclusion that these respondents had any representation or any bargaining unit in their behalf before the Joint Conference Committee?

In Smith v. Evening News, *supra*, 9 L. Ed. 2d at 249, this court held that an employee does have the right to sue for breach of contract. The court stated:

> "In Lucas Flour as well as in Atkinson the Court expressly refused to apply the pre-emption doctrine of the Garmon case; and we likewise reject that doctrine here where the alleged conduct of the employer, not only arguably, but concededly,

is an unfair labor practice within the jurisdiction of the National Labor Relations Board. The authority of the Board to deal with an unfair labor practice which also violates a collective bargaining contract is not displaced by Section 301, but it is not exclusive and does not destroy the jurisdiction of the courts in suits under Section 301."

The court then concluded that the petitioner's action "arises under Section 301 and is not pre-empted under the Garmon rule."

Even the petitioners seem to concede that that case is analagous to the present case insofar as jurisdiction of the state court to decide an issue involving breach of contract. In their petition for Writ of Certiorari to the Court of Appeals of the State of Kentucky, at page 15, the petitioners stated:

> ". . . it must be concluded that the subject matter is within the exclusive competence of the Board and that the state courts are without jurisdiction. The court has already consented to review an analogous issue in Smith v. Evening News, certiorari granted 7 L. Ed. 2d 793 (1962) (No. 89, 1961 Term). The Evening News case, like the present one, involves a question of whether the state court has jurisdiction over a suit for damages for breach of a collective bargaining agreement where the action complained of also constituted an unfair labor practice in violation of the National Labor Relations Act."

Even before the Smith v. Evening News case, *supra,* the state courts had jurisdiction over this issue, under

authority of the case of International Association of Machinists v. Marcos Gonzales, 356 U. S. 617, 620, 2 L. Ed. 1018, 78 S. Ct. 923, where it was held that federal legislation had not pre-empted the field where breach of contract between the employee and the union was the issue before the state court. This court stated:

> "In either case, the potential conflict is too contingent, too remotely related to the public interest expressed in the Taft-Hartley Act, to justify depriving state courts of jurisdiction to vindicate the personal rights of an ousted union member. This is emphasized by the fact that the subject matter of litigation in the present case, as the parties and the court conceived it, was a breach of contract governing the relations between the respondent and his unions."

In Textile Workers Union v. Lincoln Mills of Alabama, 353 U. S. 448, at 453, 1 L. Ed. 2d 972, 77 S. Ct. 912, this court stated:

> "Once parties have made a collective bargaining contract, the enforcement of that contract should be left to the usual processes of law and not the National Labor Relations Board."

See also Teamsters Local v. Lucas Flour Co., 369 U. S. 95, 7 L. Ed. 2d 593, 82 S. Ct. 571; Dowd Box Co. v. Courtney, 368 U. S. 502, 7 L. Ed. 2d 483, 82 S. Ct. 519, and General Drivers Union v. Riss and Co., Inc., —— U. S. ——, 9 L. Ed. 2d 918, 83 S. Ct. 790.

The respondents in this case were therefore entitled to have their rights under a collective bargain-

ing agreement determined by the forum of their choice. They were rightfully entitled to select the courts of the State of Kentucky.

(b) Whether the Decision of the Joint Conference Committee, Providing That Employees of Another Company Should Be "Sandwiched in" on the Seniority Board With Respondent Employees, the Effect of Which Was to Deny Respondents Their Jobs, Was a Decision That Could Be Enjoined by State Court Action for the Reasons: (1) It Was Not an Issue Under the Collective Bargaining Agreement Which Was to be Arbitrated, and (2) Even If It Was a Decision to be Arbitrated Under That Agreement, the Decision Was Not Reached After Fair Representation of the Respondents by Their Bargaining Unit and Was Arbitrary, Capricious, Unfair Thereby in Violation of Respondents' Contractual Rights.

First of all, let it be stated that these respondents recognize and agree that the state court in determining the rights of the respondents under this contract are bound by federal substantive law. Teamsters Union v. Lucas Flour Company, 369 U. S. 95, 7 L. Ed. 2d 593, 82 S. Ct. 571, stated:

> "We hold that in a case such as this, incompatible doctrines of local law, must give way to principles of federal labor law."

This same rule is stated in other decisions of this Honorable Court. We point it out to narrow the issues involved since we believe that under either federal substantive law, labor law, state law, or any law of equity and justice, the decision of the Court of Appeals

of Kentucky must stand. These respondents are entitled to an injunction to prevent the enforcement of the arbitrary ruling made by the Joint Conference Committee.

The Court of Appeals of Kentucky found that the question of whether Dealers was required to accept or absorb the affected employees was not an issue to be arbitrated under the collective bargaining agreement. It held:

> "Since Article IV, Section 5 had no application under the circumstances of this case, we are of the opinion that the question was not arguable under the grievance procedure. Arbitrability is an issue of law, which may be determined judicially."

We agree.

The case of United Steel Workers v. Warrior and Gulf Navigation Company, 363 U. S. 574, at 582, 583, 4 L. Ed. 2d 1409, 80 S. Ct. 1347, holds that arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit by reason of the contract. We are of the opinion, as was the Kentucky Court of Appeals, that the issue of whether the employees of E & L Transport Company were to be sandwiched in on the seniority board with the employees of Dealers Transport Company was not a matter under the contract which was to be referred to arbitration. This being the case, there was no issue for the Joint Conference Committee to decide. Its decision is not, therefore, binding upon these respondents.

The full quote from the United Steel Workers v. Warrior case, *supra* (563 U. S. 582), touching on this point, is as follows:

> "The Congress, however, has by Section 301 of the Labor Management Relations Act, assigned the court the duty of determining whether the reluctant party has breached his promise to arbitrate. For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. Yet, to be consistent with Congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration, the judicial inquiry under Section 301 must be strictly confined to the question of whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made. An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubt should be resolved in favor of coverage."

Under this test the Court of Appeals of Kentucky is correct in holding this issue is not one to have been submitted to the Joint Conference Committee. There are three reasons: (1) the petitioners, Lewis and Baker, had no standing to file the original grievance since they were not employees of Dealers and were not parties to the contract made between Dealers and Local 89, which was the bargaining unit for the employees of Dealers Transport Company. (2) Article

IV, Section 5, of the contract deals only with seniority and not with initial employment and therefore until the "absorbing" company takes the employees there is no seniority problem created and therefore no question to be arbitrated. (3) The facts show there was no absorption of business by Dealers of another private contract or common carrier and therefore Article IV, Section 5, has no application.

Article VII, Section 2a, described as Grievance Procedure, provides:

> "Disputes shall first be taken up between the *employer* and the *local union* involved. If the parties are unable to settle the dispute, the same shall then go to the local joint committee." (Italics supplied.)

Since the contract itself provides that disputes shall be taken up between the employer and the local union involved, how could this dispute be taken up between the employer and the local union, when, in fact, the petitioners who filed this grievance were not employees of Dealers Transport Company? This grievance could not be taken up with Dealers Transport Company under the terms of the contract, likewise, there was no way for the parties to settle the dispute since they were not parties to the same contract. This, of course, involves the question of who are parties to a contract which has been described as a Multi Employer Unit? The opinion of the Court of Appeals of Kentucky raises the supposition that E & L men are represented by a different union and asked the question: "Would

they have any rights under this contract between Dealers and another collective bargaining agent?" The Court of Appeals answers: "Surely not."

This grievance could not be arbitrated when the parties who filed the grievance were not parties to the contract between Dealers and Local No. 89 and by the terms of the contract, there is no provision for the bringing of a grievance by a party who is not an employee of the employer concerned.

The Joint Conference Committee based its ruling upon the provisions of Article IV, Section 5, of the Automobile Carrier Truckaway Agreement. That section provides:

> "In the event that the employer absorbs the business of another private, contract or common carrier, or is a party to a merger of lines, the seniority of the employees absorbed or affected thereby, shall be determined by mutual agreement between the employer and the unions involved. Any controversy with respect to such matter shall be submitted to the Joint Grievance Procedure."

This provision of the contract can give the petitioners herein no rights under this contract, since they are not a party to it, as they have never become employees of Dealers. This argument is well expressed in the decision of the Court of Appeals where it is stated:

> "It (Article IV, Section 5) deals only with seniority, and not with initial employment. Unless and until the absorbing company agrees to take the employees of the company whose business is

being absorbed, no seniority problem is created, hence this provision of the contract can have no application. It does not require that the absorbing company take these employees, but only that if it does take them, the question of seniority between the old and new employees will be worked out by agreement, or else be submitted to the grievance procedure.

". . . (They) are strangers to the dealers contract, and it was not made for their benefit."

The petitioners in their brief before this Honorable Court attempt to make this a rule of state law of the State of Kentucky, but such is not the case. Rather it is a question of interpretation of this particular contract and in it there is no provision requiring the absorbing company (if there were an absorbing company in this case) to employ the employees of the company absorbed. There being no such provision in the contract there is, therefore, no issue to be submitted to the grievance board or to the Joint Conference Committee.

For our third reason under this argument, we submit there was no absorption of the business of E & L by Dealers. E & L was abandoning its secondary runs from Louisville, Kentucky as it became necessary to consolidate its business on a geographic basis. Dealers was taking the same steps to consolidate its business geographically and both companies were doing so by reason of the competition of "piggy back" hauling of automobiles by Ford Manufacturing Company. There is no contention here that the withdrawal by E & L

was in any way contingent upon acceptance of those secondary runs by Dealers. Further, it is apparent the only way Dealers can acquire these runs is through administrative ruling of the Interstate Commerce Commerce Commission. Dealers could accomplish this by making a new application on its own or by application to take over the secondary runs of E & L. It chose to take over the secondary runs of E & L and applied for permission to do so. There was no transfer of any assets between Dealers and E & L and the only cash involved was that sum sufficient to pay the cost of the transfer of the secondary runs before the I.C.C. Can such a change in the course of business brought about by conditions outside the authority of either employers or the employees, be considered either an absorption of the business of E & L or a merger of the companies? Can such a change in business status, without the transfer of any assets, be considered a merger or absorption so as to give employees of another company any rights under a contract of employment between an employer and its employees? We think not and by reason of this it is apparent that the decision of the Joint Conference Committee, based upon Article IV, Section 5, of the Bargaining Contract, is a decision made on an issue not before it because it is not one to be arbitrated under this contract.

It is next the contention of these respondents that even if there was an issue which could be arbitrated as a grievance before the Joint Conference Committee,

which we, as above argued, contend is not the case, that this particular decision of the Joint Conference Committee cannot stand. The very essence of this case is the validity of a binding written Collective Bargaining Agreement. We recognize and heartily approve of the decisions of this Honorable Court wherein collective bargaining is encouraged and a settlement of labor issues are resolved by arbitration rather than by legal action. There is no issue here made by respondents which is "incompatible with the concept of collective bargaining as a 'continuous process' " referred to by petitioners on page 11 of their brief. Nor is this an effort to "jettison selected disadvantages of collective action while preserving selected advantages" as contended on page 19 of their brief. Again we state the question is, what rights does an individual acquire by reason of a written contract, where that contract happens to be a collective bargaining agreement?

This court has recognized and upheld the right of an individual to sue under a collective bargaining agreement. This court has also recognized that there is a limit to the authority of an arbitrator and has further placed a burden upon the collective bargaining unit who is the chosen representative of employees to bargain honestly and fairly on behalf of its members. This is vitally necessary for the reason expressed in the case of Conley v. Gibson, 355 U. S. 41, 46, 2 L. Ed. 2d 80, 78 S. Ct. 99, wherein this court stated:

> "A contract may be fair and impartial on its face, yet administered in such a way with the

active or tacit consent of the Union, as to be flagrantly discriminatory against some members of the bargaining unit."

The case of Ford Motor Company v. Huffman, 345 U. S. 330, at 336, expresses the obligation of the bargaining agent as follows:

> "The National Labor Relations Act as passed in 1935, as amended in 1947, exemplifies the faith of Congress in free collective bargaining between *employers* and their *employees* when conducted by freely and fairly chosen representatives of *appropriate units of employees.* That the authority of bargaining representatives, however, is not absolute is recognized in Steele v. L & N Railroad Company, 323 U. S. 192, 198, 199, 89 L. Ed. 173, 65 Supreme Court 226, in connection with the comparable provisions of the Railway Labor Act. Their statutory obligation to represent all members of an *appropriate unit,* requires them to make an honest effort to serve the interest of all those members without *hostility to any.*" (Italics supplied.)

Professor Cox in his article "Rights Under a Labor Agreement," 69 H. L. R. 601 at page 638, states:

> "The relationship between law and industrial relations will be improved, and collective-bargaining will work better, in my opinion, without any sacrifice of the interest of individual employees, if contracts which contemplate active administration through a grievance and arbitration procedure controlled by the union are held to vest the power

to settle grievances in the collective-bargaining representative, *subject to its fiduciary duty of fair representation.*" (Italics supplied.)

In Clark v. Hein-Werner Corporation, 99 N. W. 2d 132, 8 Wis. 2d 264 (Wis. 1960), cert. denied 362 U. S. 962, the court recognized this conflict, saying:

> "In most situations whether the union is performing its fiduciary duty of fair representation in an arbitration proceeding presents a question of fact. However, where the interests of two groups of employees are diametrically opposed to each other and the union espouses the cause of one in the arbitration, it follows as a matter of law that there has been no fair representation of the other group . . . the old adage that one cannot serve two masters is particularly applicable to such a situation."

What bargaining unit was representing these respondents? Is it not true that the basic unit of labor organizations is the unit comprised of employees of a particular employer, who bind themselves together by selection of one representative to seek for them certain beneficial rights in connection with that employment? These respondents chose Local 89 and that Local, as their bargaining unit and representative, secured for them a written contract, which was of benefit to these employees. That same bargaining unit happens to be the bargaining unit of a group of employees who are the petitioners in this case, who have a similar contract with their own employer. It is readily apparent that the conflict between employees of

E & L and the employees of Dealers is irreconcilable and one of those two rival groups of employees must suffer because of circumstances over which neither they nor their employer had control. What is the bargaining unit in such a case? Can it possibly be said that Local 89 under the circumstances of this case represented these respondents in the hearing before the Joint Conference Committee? Even the petitioners admit that these respondents were told up until the time a few minutes before the decision was rendered by the Joint Conference Committee that the decision would be in their favor, but it changed its mind and the decision went against these respondents. Does such action meet the test as stated in the Huffman case, above, that the fairly chosen representatives of appropriate units of employees, must serve the interest of those members without *hostility* to any? The answer is that their bargaining unit did not represent them and that such a decision reached in that manner cannot stand.

Impartiality of an arbitrator is recognized as a basic requirement:

> "As an arbitrator acts in a quasi-judicial capacity, it is generally held that he must possess the judicial qualifications of fairness, disinterestedness, and impartiality. Consequently, the existence of any facts which may operate to affect the impartiality of arbitrators, provided such facts are unknown to the party adversely affected, will render such arbitrators incompetent to make a valid award.

"The fact that an arbitrator has previously formed and expressed his opinion on the matter submitted may be grounds for setting aside the award . . ."

6 C. J. S., Arbitration and Award, Section 46b, page 186.

In the case of Drivers Union v. Riss & Co., *supra*, ——U. S. ——, 9 L. Ed. 2d 918, 920, 83 S. Ct. 790, the validity of a Joint Area Cartage Committee award was in issue. This court did not decide the validity of that award since it was unnecessary to the decision but the court did recognize the right to question the validity of such an award by a suit for breach of contract:

"Of course, if it should be decided after trial that the grievance award involved here is not final and binding under the collective bargaining agreement, no action under Section 301 to enforce it will lie. Then, should petitioners seek to pursue the action as a Section 301 suit for breach of contract, there may have to be considered questions unresolved by our prior decisions."

The present case may reach those issues. In this regard it is our position that these respondents were not fairly represented, that the Union mislead them by assurances of a favorable decision until a few moments prior to the actual hearing, that the union had an interest in the outcome of the hearing and used its influences to achieve that end so as to violate its duty not to act with hostility to a member or group of members.

We recognize and do not wish to undermine the desirability of settlement of differences by the means chosen by the parties in the collective bargaining agreement. This does not mean, however, that a decision destroying rights of individuals under a written contract can be upheld when made at a time the real parties in interest were not represented and the joint board had an interest in the outcome. A joint board must be as impartial as an arbitrator and the parties in interest must be represented on such a board if it is to be given the power of an arbitrator and if its decisions are given the weight of an arbitration proceeding. Otherwise, the union is failing in its duty of fair representation without hostility to any member of its union.

Any arbitrator, however, is limited in its authority. This limit is expressed in the case of United States Steel Workers of America v. Enterprise Wheeler & Carr Corporation, 363 U. S. 593, 597, 4 L. Ed. 2d 1424, 80 S. Ct. 1358, wherein this court discussed the powers and authority of an arbitrator:

> "When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of the problem. . . . Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement.

> When the arbitrators words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.'

The decision reached by the Joint Conference Committee completely disregards the rights of the employees of Dealers, respondents herein, to the collective bargaining agreement. The contract of Dealers, while similar to the contract that E & L had with its employer, is a separate collective bargaining contract and these employees of Dealers cannot be deprived of their jobs when there was no absorption of another business and there is no argument with their own employer. Even if we assume that this is not a separate contract, the decision of the Joint Conference Committee completely disregards the contract as provided in Article IV governing the seniority rights of employees. E & L terminated its operation at Louisville. If employees of E & L had any rights under the Truckaway Agreement, it is stated in Subsection (b)2: which provides that when a branch terminal divisional operation is closed or partially closed, the employees at the partially closed branch terminal shall have "the right to transfer to the branch terminal divisional operation into which the work was transferred, if regular work is there available. Such employee, however, shall go to the bottom of the seniority board and shall have the right of job selection only in accordance with seniority at such terminal." When read in conjunction with Section 1 of Article IV it is apparent this Truckaway Agreement contract preserves the rights of an em-

ployee to continue working at the terminal which is his regular and fixed place of employment and if employees of some closed branch transfer, they go to the bottom of the seniority board. Dealers' employees, the respondents herein, are the parties who are continuing to work at the regular place of employment and E & L employees, the petitioners herein, are the ones who transfer. Certainly, the decision of the Joint Conference Committee is directly in conflict with the contract.

The decision of an arbitrator, if the Joint Conference Committee can be considered an arbitrator in this instance, reached in disregard to the specific contractual rights of certain parties to that contract, cannot stand. It is particularly true that such a decision cannot stand where employees for whom the contract was made were not fairly and honestly represented.

SECTION VI.

CONCLUSION.

The judgment of the Court of Appeals of Kentucky should be affirmed.

Respectfully submitted,

JOHN Y. BROWN,
BROWN, SLEDD & MCCANN,
601 Security Trust Building,
Lexington, Kentucky,
Attorneys for Respondents.

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On a Writ of Certiorari to the Court of Appeals of the State of Kentucky

REPLY BRIEF FOR PETITIONERS

H. SOLOMON HOREN
Kentucky Home Life Building
Louisville, Kentucky

WILLIAM S. ZEMAN
1 Grand Street
Hartford, Connecticut

MOZART G. RATNER
1411 K Street, N. W.
Washington, D. C.

Counsel for Petitioners

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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REPLY BRIEF FOR PETITIONERS

I.

Playing hide and seek with its professed "neutrality," respondent Dealers belatedly challenges the authority of the Joint Conference Committee on two grounds: (1) the Committee did not negotiate the con-

tract and therefore lacked power to interpret or modify it (p. 6); and (2) Dealers was not notified that the Union intended to urge "sandwiching" (p. 5).

As to the first ground, the short answer is that at all prior stages of the case Dealers conceded that the Joint Committee *did* have authority; it told the court below that Dealers felt "bound to honor the * * * decision" (Br. p. 4). It is a little late in the day for Dealers to renege. In point of fact, the Joint Conference Committee (which Dealers erroneously calls "Joint Board"), consists of "duly elected delegates of the Employers (Automobile Transporters Labor Division) and of the Unions (National Truckaway and Driveaway Conference)" (R. 10, fol. 19d-19e). The Division and the Conference *did* negotiate the contract (R. 14). The record shows that the Division is composed of "the national representatives of the automobile transporting companies," who have "power of attorney" to represent and "sign for" Dealers and every other member company (R. 52). The Conference, of course, is the duly authorized representative of its member unions, and, as such, is "the exclusive representative of all employees" in the Truckaway and Driveaway unit (R. 9).

The authority of the Division and the Conference to delegate to their respective representatives on the Joint Committee power finally to resolve questions of contract interpretation (R. 12-13), and controversies arising out of absorptions and mergers (R. 10, fol. 19c), is thus an attribute of their own unquestioned representative status and statutory bargaining authority. Not a scintilla in the record suggests that either the companies or the local unions ever attempted to impose any limitation upon the collective bargain-

ing authority they delegated to the Division and the Conference respectively.

As to the second ground, the short answer is that, having concealed the truth from the Union, Dealers cannot be heard to claim surprise at the Union's reaction to discovery. If "Dealers was unaware * * * that the Union intended to take a position that Dealers' employees and E & L employees were to be sandwiched" (p. 5), the reason is that prior to the hearing Dealers misrepresented the "absorption" facts (R. 47, 57.)[1] Obviously, an employer cannot be allowed to "gain any possible advantage" (II Scott, *Trusts* (2d ed., 1956), § 172, p. 1288), from concealment of facts necessary to the Union's performance of its statutory function of policing compliance with, and participating in administration of, the contract. *International Ass'n. of Mach.* v. *International Air. Serv.*, 302 F. 2d 808, 816 (4th Cir. 1962); *N.L.R.B.* v. *F. W. Woolworth Co.*, 352 U.S. 938 (1956), reversing 235 F. 2d 319 (9th Cir.), setting aside 109 NLRB 196; *J. I. Case Co.* v. *NLRB*, 253 F. 2d 149, 153 (7th Cir. 1958); *NLRB* v. *John S. Swift Co.*, 277 F. 2d 641, 645 (7th Cir. 1960). Concealment violates the "covenant of good faith and fair dealings * * * which must inhere in every collective bargaining contract if it is to serve its institutional purposes." *United Steelworkers* v. *New Park Mining Co.*, 273 F. 2d 352, 356 (10th Cir. 1959); Bogert, *Trusts and Trustees* (2d ed., 1962) § 974, p. 270.

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[1] Respondent Dealers' statement (Br. p. 2) that its employees were told by the Union "that the grievance of E & L's employees would not be considered" is unsupported by any citation to the record and it is factually incorrect. The record shows that the employees were told that, absent "absorption," the grievance would be denied. See our main Brief, p. 45, note 20.

Respondents Moore, et al., would argue (pp. 13-15), that the Committee had no authority because E & L employees lacked standing to file a grievance. But standing to grieve is also a question of interpretation of the contract, and, under federal law, such questions are within the scope of the contracting parties' power to settle by agreement. Respondents' admission (*ibid.*, p. 20) that the decision below entails determination "[w]hat bargaining unit was representing these respondents" carries a death wound. Where, as here, employees of many employers have selected a common bargaining agent and engaged in joint bargaining, they are members of a multi-employer bargaining unit as a matter of federal law. See our main brief, p. 33; Brief for Petitioners in No. 18, pp. 26-28. The fact is that the contract benefits respondents enjoy are not the product of bargaining by Local 89 with Dealers, as respondents would have it, but by the Conference with the Division.

II.

Both respondents persist in ignoring the central fact that seniority clauses affecting future employment are not "terms peculiar in the individual benefit which is their subject matter and which [therefore] * * * give a cause of action to the individual employee * * * [where] the employee and the union are in disagreement * * *." *Employees* v. *Westinghouse Corp.*, 348 U.S. 437, 460, 459 (1955). Rights "which under state law are distributed among the union members," are vested by Section 9(a), 8(d) and 301 "in a legal 'entity' recognized by federal law." *Ibid.*, at 451. Reliance upon Mr. Justice Black's dissent in *Smith* v. *Evening News* overlooks his concurrence with Mr. Justice Douglas in *Westinghouse* (348 U.S. at 467):

> "In short, the union represents the interest of the community of employees in the collective bargaining agreement. The wide range of its interests are envisaged by the Act, which gives the collective bargaining agency exclusive authority to bargain 'in respect to rates of pay, wages, hours of employment, or other conditions of employment.' 29 U.S.C. § 159(a), 29 U.S.C.A. § 159(a). The range of its authority is the range of its interests."

The bargaining agent's interest in and authority over "conventional uses of the seniority system in the process of collective bargaining" (*Aeronautical Lodge* v. *Campbell*, 337 U.S. 521, 526 (1949)), comprehends "such matters as the unit within which seniority is to be computed [and] the privileges to which it shall relate * * *." *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 339 (1953).

Respectfully submitted,

H. Solomon Horen
Kentucky Home Life Building
Louisville, Kentucky

William S. Zeman
1 Grand Street
Hartford, Connecticut

Mozart G. Ratner
1411 K Street, N. W.
Washington, D. C.

Counsel for Petitioners

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

Nos. 17 and 18

No. 17

WALTER HUMPHREY, *et al.*,

Petitioners,

v.

C. W. MOORE, *et al.*,

Respondents.

No. 18

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION No. 89,

Petitioner,

v.

C. W. MOORE, *et al.*,

Respondents.

ON A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY

REPLY BRIEF FOR PETITIONER IN CASE NO. 18

DAVID PREVIANT
511 Warner Bldg.
Milwaukee 3, Wisc.

HERBERT S. THATCHER,
DAVID S. BARR
1009 Tower Bldg.
Washington 5, D. C.

RALPH H. LOGAN
506 W. Jefferson St.
Louisville 2, Ky.

MICRO CARD
TRADE MARK ®
22
MATTHEW BENDER & COMPANY
MB
30
-64
m
microcard

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ON A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY

REPLY BRIEF FOR PETITIONER IN CASE NO. 18

In cases nos. 17 and 18 a brief has been filed by respondents C. W. Moore, *et al*, and in Case No. 17 a separate brief has been submitted by respondent Dealers Transport Company. We propose herein to respond to both of these briefs.

I

REPLY TO BRIEF OF DEALERS

A great deal of time and effort was spent by both respondents in the courts below emphasizing their belief that Dealers, as the employer of one of the two groups of employees involved in this case, was in a neutral position. The cloak of neutrality has fallen by the filing of Dealers' brief.

A. Notice to Dealers

Dealers now presents an argument which has never been presented before during these proceedings. The company states (on pages 4 and 5), that Dealers was not made aware of the position the union intended to take before the Joint Conference Committee[1] and states that had it been given such notice, its position "could possibly" have been against the dovetailing arrangement. This newly found argument has no factual foundation.

For Dealers had notice of the issue to come before the Committee, was actually present at the hearing, knew at that time precisely what the Union's position was, and had an opportunity to object. Instead of expressing objection or disagreement, Dealers was content to state the facts to the Committee and to remain "neutral." (R. 44, 48-49, 55-59).

Any implication in the brief that the Joint Conference Committee did not have the authority to bind Dealers by its decision must be rejected. By the collective bargaining agreement, this employer unequivocally agreed "to be bound

---

[1] The committee which rendered the decision to dovetail seniority pursuant to the contract in this case is known as the Joint Conference Committee and not, as variously described in Dealers' brief, the "Joint Board" or the "Joint Grievance Committee" (See, e.g., Dealers brief, page 6).

by all of the terms and provisions of this Agreement, and . . . by the interpretations, and enforcement of the Agreement." (R. 13). This employer also agreed "to become a part of the multi-employer unit set forth in the Agreement." (R. 13). There is, of course, nothing in the record to indicate that Dealers had ever attempted to withdraw that authority or to extricate itself in any way from the collective bargaining agreement. Quite the contrary is true. As illustrated by the testimony of Mr. Snites, the Vice President and General Manager of Dealers, Dealers hastened to comply with the decision of the Joint Conference Committee immediately upon its issuance:

> 67. Now, that decision having been rendered, did you set about to put it into effect in Louisville?
>
> A. Yes, sir. The minute I got the decision I immediately got in touch with my Terminal Manager and my Personnel and Safety Manager and told them to comply with the decision, to post it on the bulletin boards so all could see it and to immediately begin to comply with the decision. (R. 44).

B. *Finality of Decision.*

A further argument is made to this Court for the first time, an argument which was not presented below and which the Court of Appeals of Kentucky would itself probably reject. The argument points to the fact that arbitration was the terminal step in the grievance procedure under Article VII and that because the instant dispute was not taken to arbitration, the decision of the Joint Conference Committee was not a "final decision." (Dealers brief, pages 6 and 7). Support for this proposition, says Dealers, may be found in this Court's decision in *Drivers Union* v. *Riss and Co.*, 9 L ed 2d 918 (1963). This particular argument completely misconstrues the force of the *Riss* decision and would upset the federal policy under Section 301. The argument is, in effect, that any decision rendered in any step of the grievance procedure,

whether by majority vote or unanimous vote, as was the case here, is unenforceable if there is one more step in the grievance procedure. Completely overlooked is the fact that in view of the unanimous decision of the Joint Conference Committee, arbitration was simply not available to any of the parties with respect to this dispute. Article VII, Section 2 (c) (R. 12) states that arbitration would be available if, but only if, "any grievance or disagreement is not satisfactorily settled, as provided above. . . ." A decision having been rendered unanimously by the Joint Conference Committee in this case, the dispute was conclusively ended. It is of no importance for purposes of Section 301 that the traditional method of "arbitration" was not utilized. That is precisely the holding in *Riss*. "The means chosen by the parties for the settlement of their differences under a collective bargaining agreement" which the Supreme Court said must be given "full play" was that grievances may be finally and conclusively settled by the bipartisan committee and that only failing agreement would it be necessary and proper to bring the matter to arbitration. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 566 (1960). The confusion of respondent Dealers with respect to the holding in *Riss* might well stem from the following portion of the opinion:

> "Of course, if it should be decided after trial that the grievance award involved here is not final and binding under the collective bargaining agreement, no action under Section 301 to enforce it will lie." (9 L ed 2d at 920 to 921).

The foregoing refers to the fact that the contract in the *Riss* case provided that all matters of interpretation were to be referred to a bipartisan committee "for final decision." Thus, a question arose in the Court's mind as to whether decisions of that committee were intended by the parties to have a final and binding effect upon them; in short, whether the issuance of such a decision would by contract preclude the continuation of the dispute in other forums or by means of self help. Such a question does not exist in

this case. The contract here also provides that all matters of interpretation must be submitted to the Joint Conference Committee (Article VII, Section 2 (d); R. 12), but adds that "any decision of the . . . Joint Conference Committee shall be final and conclusive and binding upon the Employer and the Union, and the employees involved," (Article VII, Section 2 (e); R. 12), it being "the intention of the parties to resolve all questions of interpretation by mutual agreement." (Article VII, Section 2 (f); R. 13). Certainly, the *Riss* case was not intended to permit the argument that any and all settlements which are made at any step of a grievance procedure short of arbitration are to remain unenforceable, despite contractual agreement to the contrary, so long as arbitration or any higher step in the grievance procedure had not been utilized. The contrary contention of Dealers is wholly without merit.

C. *The Negotiated Agreement.*

In response to petitioner's principal argument that the determination of the Joint Conference Committee constituted a negotiated agreement between the parties and was therefore not subject to judicial review, Dealers argues (at p. 6) that the Joint Conference Committee had no right "to revise the contract in compliance with its decision" since the Committee "did not negotiate the contract." This argument too misses the point. The Joint Conference Committee made no attempt "to revise the contract." Rather, the representatives of the unions and employers, members of the multi-employer bargaining unit, who comprised the Joint Conference Committee simply carried out the mandate of Article IV, Section 5, of the contract that in cases of "absorption" the seniority of the employees shall be a matter for further negotiation between the parties. It does not matter that the Joint Conference Committee itself did not negotiate the original contract. Through Article IV, Section 5, the National Conference representing the unions and the Automobile Transporters Labor Division representing the employers authorized the bipartisan members of the Joint Conference Committee to carry out the necessary negotiations under that provision of the contract

in their behalf. Had the contract delegated such authority to a shop steward on the one side and a foreman on the other, the resulting determination would be no less a negotiated agreement and the result in this case would be no different. "Both the negotiation of a new employment standard and the administration of an existing one may be effected through the grievance machinery." Dunau, "Employee Participation in the Grievance Aspect of Collective Bargaining," 50 Col. L. Rev. 731, 733 (1950).

D. *Scope of Judicial Review.*

Finally, Dealers contends (at p. 6) as follows: "The lower court held there was no merger or absorption of the business of E&L by Dealers (R. 26). If this holding is correct, the Joint Board [sic] had no authority under Article IV, Subsection 5, to decree a merger of the two seniority lists." We submit, as stated in our original brief, pages 28 to 36, that the court had no right at all to review the result of the negotiation between the contracting parties. But even if the Joint Committee determination were not the product of negotiation, it is immaterial whether the state court interpretation of Article IV, Section 5, was "correct" simply because the state court had no right to undertake such an interpretation. As stated by this Court on so many occasions, "it is of course not open to the courts to reweigh the merits of the grievance." *Drivers Union v. Riss and Co.*, 9 L ed 2d 918-920 (1963).

II

REPLY TO BRIEF OF C. W. MOORE

1. The brief for the respondents C. W. Moore, *et al*, constitutes a rather confusing shotgun attack going to several issues presented by the petitioners in both cases. It demonstrates a lack of awareness of the meaning and application of federal law. "Let it be stated," says the brief, "that these respondents recognize and agree that the state court in determining the rights of respondents under this contract are bound by federal substantive law." (C. W. Moore Brief, page 11). The brief then proceeds to shatter federal substantive law in every respect. Thus, the brief

argues the facts to this Court intending to demonstrate that the merits of the grievance were wrongly decided by the Joint Conference Committee and correctly decided by the court below. This Court has observed, however, that "it is the arbitrator's construction that was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." *United Steelworkers v. Enterprise Corp.*, 363 U.S. 593, 599 (1960).

Since, however, the facts mustered by respondents in support of their argument might tend to mislead, they are worthy of brief comment in reply. Respondents for the first time point to two contract provisions which do not appear in the designated record as supporting their own interpretation of Article IV, Section 5. The first of these is Article I, Section c, (at page 3). That provision comes into play only "when the employer needs additional men." That was not the situation in this case. The provision has nothing whatever to do with seniority in cases of absorption or merger. The second provision relied on is Article IV, Section 6, Subsection (b) 2 (at pages 3 and 24). It states that when a terminal closes employees may transfer to the terminal to which the work was transferred but shall at that terminal be placed at the bottom of the seniority list. Respondents' reliance on this clause overlooks a very vital distinction between Sections 5 and 6 of Article IV. Section 5 which formed the basis of the Joint Conference Committee determination obviously applies in the case of inter-company mergers or absorptions. Section 6, on the other hand, applies to intra-company transfers among and between its terminals. That distinction is the very reason why Local 89 was interested in finding out the nature of the transaction between Dealers and E&L in order to form its position as to which section of the contract would apply to that particular situation.

Attempting to show that there was no absorption in this case, respondents state (at page 4) that "Dealers did not take over any . . . business of E&L." However, in the very

sentence preceding it, they state that "Dealers took over certain secondary runs formerly held by E&L" and in the sentence immediately following they state that there was a payment "for all of the business taken over by Dealers from E&L." At page 7 of their brief, respondents state: "It is a reasonable assumption that it was the very efficiency of Dealers' employees that caused Ford to select that company for its business." The record, however, shows that no such selection was made:

> 26. Which one of the groups did Ford Motor Company select when they selected a carrier?
> A. Ford didn't select.
> 27. Is that right?
> A. That's right.
> 28. I was under the impression they had selected one.
> A. No, sir.

Relying on these incorrect facts, respondents proceed to draw inferences which would tend to support their own interpretation of the contract (brief of C. W. Moore, pages 13 and 14). Regardless of the correctness or incorrectness of their statement of facts, respondents demonstrate the very error committed by the court below. If federal law is indeed to be our guide, as it must, the resolution of these questions of fact, inferences, and interpretations was solely the function of the Joint Conference Committee and not of the respondents or the courts. *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960).[2]

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[2] It would appear that much of respondents' error stems from their failure to distinguish between the concepts of "bargaining agent" and "bargaining unit" and the nature of a multi-employer multi-local union bargaining unit within the meaning of the NLRA. (See Brief for Petitioner in No. 18, pages 25 to 28). Thus, respondents state (at page 8): "The bargaining unit for the employees of Dealers Transport supposedly was Local 89;" at page 18, they refer to "a burden upon the collective bargaining unit who is the chosen representative of employees." At page 20, they ask, "what bargaining unit was representing these respondents?"

2. One final word with respect to respondents' argument relative to hostile discrimination: respondents argue to this Court that whenever two groups of employees represented by the same union disagree and the union espouses the cause of one, the other has been, as a matter of law, denied fair representation. (Brief of C. W. Moore at page 20). The case relied upon is *Clark* v. *Hein-Werner Corp.*, 99 N.W. 2d 132, 8 Wis. 2d 264 (1960). A close reading of that case will demonstrate that the Wisconsin Court was concerned about an apparent lack of due process since a group of affected employees were not given specific notice and opportunity to attend the arbitration proceeding and present their position. There is no such situation present here. Insofar as dictum in the *Clark* case supports the respondents' argument, it is in plain conflict with the decisions of this Court and the underlying policies of the Act. As stated by this Court in *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 337-338 (1953):

> Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected.

See also the comments of outstanding observers in labor law at pages 32 to 35 of Petitioner's Brief. In effect the respondents, by making this contention, would have this Court convert its previous requirement of a showing of hostile discrimination in cases where the union's representation has been challenged into a *per se* doctrine which is unsupported by reason or the realities of collective bargaining.[3] An outstanding commentator has effectively summed up the *Hein-Werner* dictum as follows:

> The effect of this dictum is to neutralize the union on every question of contract interpretation concerning

[3] *Clark* v. *Hein-Werner* stands in part for what Prof. Aaron has called a "highly unrealistic doctrine." Aaron, "Reflections on the Legal Nature and Enforcement of Seniority Rights," 75 Harv. L. Rev. 1532 (1962).

which the opinion of its membership is not unanimous—that is to say, on almost every issue. One would be hard put to find a better recipe for undermining union responsibility and promoting general anarchy within the plant community. Aaron, "Some Aspects of the Union's Duty of Fair Representation," 22 Ohio State Law Journal 39, 51 (1961).

Respectfully submitted,

David Previant
511 Warner Bldg.
Milwaukee 3, Wisc.

Herbert S. Thatcher,
David S. Barr,
1009 Tower Bldg.
Washington 5, D. C.

Ralph H. Logan
506 W. Jefferson St.
Louisville 2, Ky.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1963,

No. 17

WALTER HUMPHREY, ETC., ET AL., - Petitioners,

versus

C. W. MOORE, ETC., ET AL.,
GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION No. 89,
and
DEALERS TRANSPORT COMPANY, - Respondents.

AND

No. 18

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION No. 89, - Petitioner,

versus

C. W. MOORE, ET AL., - - - Respondents.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF KENTUCKY.

PETITION FOR REHEARING BY C. W. MOORE, ETC., ET AL.

JOHN Y. BROWN,
BROWN, SLEDD & McCANN,
601 Security Trust Building,
Lexington, Kentucky,
Attorneys for Respondents.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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DEALERS TRANSPORT COMPANY, - - *Respondents.*

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v.

C. W. MOORE, ETC., ET AL., - - *Respondents.*

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

PETITION FOR REHEARING BY C. W. MOORE, ETC., ET AL.

Respondents, C. W. Moore, individually, and for and on behalf of members of the class, present their petition for rehearing of the above entitled cause, and, in support thereof, respectfully submit this memorandum.

GROUNDS FOR REHEARING.

The opinion of the Court deciding the issue concerning duty of fair representation by the Union fails to accurately reflect the facts, as there is sufficient evidence of failure of fair representation under the law as expressed by the Court in this opinion to sustain the Kentucky Court of Appeals.

The Court states on page 15 of its opinion:

> "Dealers employees had notice of the hearing, they were *obviously aware* that they were locked in a struggle for their jobs and seniority with the E & L drivers, and three stewards *representing* them went to the hearing at union expense and were given *every opportunity* to state their position."

The conclusion by this Court that these respondents were "obviously aware" of the struggle for their jobs is clearly erroneous. The facts show, without dispute, that the Union representatives assured these respondents (and the employees of E & L) that there was no problem. They had been consistently told there was no difficulty with their jobs until fifteen minutes before the hearing at Detroit. This fact is recognized by the Court in its opinion on page 13.

The conclusion that there was any act of "representing" by these stewards who attended the hearing is equally erroneous. There is no evidence that the three stewards had made any preparation or that they were able to adequately state their position before the

hearing. The assurances of their Union eliminated the necessity for representing themselves until the hearing.

The conclusion that they had "every opportunity" to state their position simply is not true. What opportunity did these stewards have to state a position under these facts? It is true that these unprepared individuals stepped into the conference room and made a short statement, but that cannot be considered as any opportunity of representation.

The Court seems to imply that the stewards had the duty to request a continuance. We submit that the duty to grant these respondents a fair hearing rests with their union which, under the law, has the obligation of fair representation. We further submit that if there was an obligation to obtain a continuance and permit a fair hearing that that duty rests with the union and not with the stewards who happened to accompany their union leader.

The issue here is not whether the result of the hearing would have been different (that is certainly idle speculation), but whether the union fulfilled its duty of fair representation. One fact stands out abundantly clear—these stewards did not add to the hearing any "facts or theory" and they were told up until the moment of the alleged hearing that they "had nothing to fear". If this Court wants to go on record as saying that such an admitted lack of hearing makes no difference because the outcome of the hearing might not have been different, this country and its law has progressed a long way from the concept of a fair hear-

ing as conceived by the framers of the Constitution. The Court states on page 15 of the opinion:

> "As far as this record shows, the Union took its position honestly, in good faith and without hostility or arbitrary discrimination."

If the Court can take this record and make the unequivocal statement there is no evidence of lack of good faith or arbitrary discrimination, then we submit there is no meaning to its words that a union has the duty of fairly representing its members. Certainly no union representative is going to admit it! It could only be proven by a change of position and by the circumstances. The Court takes the word of the union official and ignores these evidences of the absence of good faith.

(1) The first step, a hearing between the employer and the local union involved in the grievance as provided in Article 7 Section 2(a) of the contract, was ignored.

(2) The hearing before the local joint conference committee was "dead locked" thereby at least raising the inference and giving the opportunity of hiding from these respondents the fact that the union's reassurances to them were untrue.

(3) Repeated assurances by the local union that these respondents had nothing to worry about, that their jobs were safe and that E & L employees should be looking for other jobs, which assurances continued until a few moments before the Detroit Joint Conference Committee.

(4) Failure to disclose the above mentioned change of position until immediately prior to the Detroit hearing, although there is evidence in this record that the local union knew their national president, James Hoffa, would take a position contrary to these respondents and contrary to the position then held by Local 89 leaders. David E. Stovall, personnel and safety director for Dealers, testified that Paul Priddy knew before he left for Detroit that Hoffa was thinking that the employees of both concerns would have to be sandwiched in and that Paul Priddy had so conveyed this information to Stovall (R. 143).

(5) Failure to provide a fair, impartial or adequate hearing to these respondents before the Joint Conference Committee.

(6) The fact that the decision reached by the Joint Conference Committee is contrary to the clear intent of the contract which was and is designed to protect terminal seniority.

(7) The fact that the union was able to predict the outcome of the hearing speaks louder than any words of the conclusion we have drawn that there was no fair hearing and that the union had power in this instance to arbitrarily decide the fate of these respondents without regard to the contract or to their rights.

The Court relies upon only one case for support of its holding that there was no evidence of improper representation by the union, Ford Motor Company v. Huffman, 345 U. S. 330. That case is not authority for what has occurred in the present case. In the Huffman case, there was a negotiated supplemental

agreement which did affect the seniority benefits of certain members of the union. In the present case there is a decision made by a Conference Committee while ruling upon a grievance where there was no negotiation and, in our opinion, where there was no hearing, yet this grievance procedure radically affected the rights of a large segment of the membership of the union.

We further cannot help but believe that under these facts, the undisputed fact that the same union represented both antagonists must be given some consideration when determining the issue of fair, honest representation.

We concur with the Court that there are instances when a union represents conflicting groups of employees and there are instances when a union must insist upon a decision which will adversely affect a certain group of its members. To deny a union these rights would, as the Court states, "gag the union" and "weaken the collective bargaining and grievance processes."

By the same token, however, when a union undertakes to represent two conflicting groups, it becomes immediately the duty of the union leaders to deal openly and aboveboard with both sides and to make a full disclosure of its position at all times, and also a full disclosure of any changes in position as soon as such changes are determined by the union. A union representative would be under the same duty that a lawyer would be if an attorney undertook to represent both sides at the request of both sides. The Bar

association bans such representation, but, if it is undertaken, all dealings must be open and aboveboard. This situation did not exist in the role played by Paul Priddy and his assistant, Les Atterbury. Both of these men undertook by deceit to make the Dealers' employees feel secure until the very moment that the meeting, which was to deprive them of their jobs, was about to be called. Priddy then stated his change of position, then withdrew from the committee which was to hear the grievance, and argued the case for one of the conflicting groups.

To say that this is fair representation makes a mockery of fair representation. This Court should authorize the taking of further proof on the question of fair representation. Counsel respectfully submits to the Court that at the time this suit was filed, the decision had already been made which would deprive the Dealers' men of their jobs; that the hearing in this case and its appeal to the Court of Appeals for a temporary injunction took place within one week's time; that ninety-seven of Dealers' men had already been discharged and replaced, and that in the hurry to get the matter before the lower court and the Court of Appeals, counsel for Moore and his associates did not take full advantage of all the proof available and the issue of fair representation is not properly before this Court, due partially to the above fact and to the additional fact that adroit counsel for the Teamsters Union brought before this Court only such excerpts from the original proof as would put the Teamsters Union and Paul Priddy in the best light. This Court

should read the entire record or should allow Respondents to take further proof on this question and should set this case, as suggested by Mr. Justice Harlan, for a further hearing on the matter of union representation.

As counsel for Respondents sought to say in the oral argument before this Court, the present procedure leaves the men as puppets and pawns in the hand of the union. As an illustration of this, counsel stated in his oral argument on October 17th before this Court a so-called hypothetical case where, out in St. Louis, an old company bought out a new company. In this instance the youngest employee of the old company was older in seniority than the oldest employee of the new company. Yet Hoffa—and make no mistakes, he dominates the Truckaway Committee in Detroit—ran all the new men around the old men and these old men lost their seniority. This is not a hypothetical case. This counsel was one of the attorneys in the case. The Court refused relief to these men to preserve their contractual rights, on the ground that the state court had no jurisdiction.

Because of the importance of this case to all the working people of America, further proof should be taken on the question of fair union representation and the Court should allow respondents to argue this question again. Future management has a stake also in this Court's decision on this vital point. Young men in the future will gather around them young employees and by their energy, they will make a success of their company. But, under the ruling of this Court in this case, a giant union like the Teamsters can stifle any

acquisition of new companies because it would make the aggressive, energetic, successful employees lose their jobs to the seniority of the men whose business they had taken. This is not the philosophy on which this country became great and this Court ought not to advance a philosophy that deprives men of putting forth their best effort for fear that by their best effort they may acquire new business that in return would cause them to lose their jobs.

There must be a distinction between the duty of fair representation as it applies to a grievance procedure, as compared with the act of negotiation for an original or supplemental contract. This Court recognizes the distinctions between negotiation for a contract, termed "bargaining", and the settlement of grievances. In Elgin v. Burley, 326 U.S. 711, the Court states that bargaining looks to the acquisition of rights for the future and not to the assertion of rights claimed to have been vested in the past and it contemplates a situation where there is no existing agreement or where such an agreement is to be changed. The Court then stated that a grievance contemplates the existence of a collective bargaining agreement already concluded and the dispute relates to the application of a particular provision to a specific situation. The present opinion seems to imply there should be no distinction. There is the distinction that not only do we have involved in a grievance the determination of rights under an existing contract, but, and perhaps even more important, there is the difference in the manner of reaching the conclusion. Negotiation or bargaining is a process

which may proceed for weeks, months or even years. The union, the union members and the employers have ample opportunity to engage in just exactly the procedure intended by the words "bargain" or "negotiate", that is, an opportunity to discuss, propose, reject, accept or compromise on many issues.

The contract as negotiated in this case provided that terminal seniority should prevail. It also provided for a binding arbitration of grievances. We agree the issue of seniority could be negotiated, even during the course of the contract, but can the clear intent of the contract be virtually replaced by a grievance procedure which, in effect, "negotiates" a new contract? This fact becomes of extreme importance when the absence of a hearing by the parties affected is considered. Therefore, we have, in this instance, the vital interests of these respondents which were incorporated in a written, binding contract decided by a grievance procedure at which time there was no "negotiation" or "bargaining" and they were not even given the benefit of a hearing. Surely a distinction must be made between the duties of a union and the opportunity for fair hearing regarding a grievance procedure and negotiation.

The Court constantly refers to the decision of the Joint Conference Committee as having *"dovetailed"* the seniority lists (Opinion, pages 7 and 13, and Justice Goldberg Opinion, page 3). The decision of the Joint Conference Committee was that "(they) shall be *sandwiched* in on a master seniority board, using the

presently constituted seniority lists and the dates contained therein at Louisville, Kentucky . . ."

The effect of this decision and the meaning of the term "sandwiched in" is that the employees with longest seniority shall be employed first regardless of which company they worked for prior to the decision. By reason of this ruling, Dealers employees were generally laid off first because they had less seniority.

"Dovetailing" has a different meaning. It means taking one man from each list. This would mean that Dealers employees would have half the jobs. Under the system by which Ford allocated its business prior to E & L withdrawing, the business was divided equally between the two companies. If there were ten loads to go to Kansas City, five would be given to Dealers, five to E & L. By a dovetailing process Dealers and E & L would have shared just as they had prior to E & L's withdrawal, but by the sandwiching process E & L gets all ten loads and Dealers gets none, or practically none.

Now, as a final contention, counsel for Respondents asks the Court to again go back and read Section 5, on page 14 of the Automobile Carrier Truckaway Agreement. To avoid that necessity, I quote said section in full.

> "In the event that the Employer absorbs the business of another private, contract or common carrier, or is a party to a merger of lines, the seniority of the employees absorbed or affected thereby shall be determined by mutual agreement between the Employer and the Unions involved.

Any controversy with respect to such matter shall be submitted to the joint grievance procedure (ARTICLE 7)."

The Court will note that this agreement says the employees absorbed or affected thereby. The Court should authorize the taking of proof as to just what employees were affected. Actually E & L sold out its terminal and no part of it was bought by Dealers. Actually E & L had left only secondary runs and these secondary runs gave employment only to twenty men. Actually, under this contract only twenty men were affected. Does not the Court believe proof ought to be taken on this question, instead of accepting the excerpts brought before this Court by adroit counsel for the Teamsters, in an attempt to show that all of E & L's business was taken over? In the taking of additional proof, we would take testimony from E & L as well as Dealers, as to whether any other men, except those on secondary runs, were affected by Dealers taking over these secondary runs.

If the contract is complied with, it would create no disturbance for the twenty men on the secondary runs to be absorbed on a seniority basis. But what the union actually did was to go out on the seniority list and pick up approximately two hundred men, most of whom had not worked for over a year, and run them ahead of Dealers' men who were working and had been working because, by their efficiency, they had taken away the business in the Louisville locality from E & L. To cause these men to lose their employment because of

their efficiency is a travesty on justice and should not receive the approval of this Court.

Men should have a right to believe that when they have a contract, they are protected by the terms of that contract. There is no conceivable way to construe this contract in the manner in which the Truckaway Committee in Detroit interpreted it. Their interpretation is a plain violation of Paragraph 2, page 17 of the Truckaway Agreement dealing with closed terminals. Indeed their order even says that because of the closing of the E & L terminal that the order is made. The method and manner of handling employees on the closing of the terminal is covered by the contract and should be a contract right upon which the men could rely.

Respondents respectfully request the Court to broaden their opinion to authorize the Court of Appeals of Kentucky to hear further proof upon the question of fair union representation and upon the question of whether or not there was an absorption or merger between Dealers and E & L and that full proof could then be before the Court in another argument on the question of fair union representation and the further question of the meaning of employees absorbed or affected.

It is the position of Respondents that since E & L had already withdrawn from the field, that only the employees of secondary runs were affected and only those employees should be dovetailed into the Dealer employee list.

Had the first step in the contract been followed—that is, a conference between Dealers employees and Dealers management—undoubtedly this would have been done, but the union, having already decided on making itself supreme with a lateral seniority precedent in the industry, deceived the Dealers employees by skipping the first step and then by depriving them of a fair hearing by deceit until the very moment the hearing was held in Detroit. It is our position that a fair hearing might well have prevented the travesty on justice that has occurred.

We respectfully submit that the Respondents did not have fair representation; that they were deceived and that this Court did not have a full disclosure of the evidence in the record as to the dealings which the union representatives had with Dealers and E & L prior to the Detroit meeting and that further proof should be allowed on union representation and on what employees are affected.

CONCLUSION.

For the foregoing reasons, these Respondents urge that this Petition for Rehearing be granted; that the judgment of the Kentucky Court of Appeals be affirmed or, in the alternative, that the Kentucky Court of Appeals be directed to allow the Respondents to take further proof on the questions above set out, and that this Court allow another argument, as suggested by Mr. Justice Harlan on the question of fair union representation.

Respectfully submitted,

JOHN Y. BROWN,
BROWN, SLEDD & MCCANN,
601 Security Trust Building,
Lexington, Kentucky,
Attorneys for Respondents.

CERTIFICATE OF COUNSEL.

I, John Y. Brown, counsel for the Respondents, C. W. Moore, individually and for and on behalf of members of the class, do hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

JOHN Y. BROWN

IN THE

Supreme Court of the United States

October Term, 1963

No. 17

WALTER HUMPHREY, ETC., ET AL., - - *Petitioners,*

v.

C. W. MOORE, ETC., ET AL.,
GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS,
LOCAL UNION No. 89, and
DEALERS TRANSPORT COMPANY, - - *Respondents.*

AND

No. 18

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS,
LOCAL UNION No. 89, - - - - *Petitioner,*

v.

C. W. MOORE, ET AL., - - - - *Respondents.*

CERTIFICATE OF SERVICE.

This is to certify that a true copy of the within Petition for Rehearing was this ____ day of February, 1964, served by mailing copies as follows: Mr. H. Solomon Horen, Kentucky Home Life Building, Louisville, Kentucky; Mr. William S. Zeman, 1 Grand Street, Hartford, Connecticut; Mr. Mozart G. Ratner, 1411 K Street, N. W., Washington, D. C.; Mr. David Previant, 511 Warner Building, Milwaukee 3, Wisconsin; Messrs. Herbert S. Thatcher and David S. Barr, 1009 Tower Building, Washington 5. D. C.;

Mr. Ralph H. Logan, 506 West Jefferson Street, Louisville, Kentucky; and Hughett, Hughett & Hughett, 314 Armory Place, Louisville, Kentucky, attorneys for Petitioners; and Mr. Newell N. Fowler, 44 North Second Street, Memphis, Tennessee, attorney for Respondent, Dealers Transport Company.

BROWN, SHADD & MCCANN,

By John G. Brown

Attorneys for Respondents,
C. W. Moore, Etc., Et Al.